

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES

E.I. du PONT de NEMOURS & COMPANY

and

Cases 3-CA-22854  
3-CA-23066  
3-CA-22957  
3-CA-23275

PAPER, ALLIED-INDUSTRIAL, CHEMICAL  
AND ENERGY WORKERS, INTERNATIONAL  
UNION, AND ITS LOCAL 1-6992

*Doren G. Goldstone and Arron B. Sukert, Esqs.*  
for the General Counsel.

*Steven W. Sufflas, Esq. Ballard Spahr Andrews &  
Ingersoll, LLP), of Voorhees, New Jersey, and  
James D. Donathen, Esq. (Phillips, Lytle,  
Hitchcock, Blaine & Huber, LLP),  
of Buffalo, New York, for the Respondent.*

*Kathleen A. Hostetler, Esq., of Denver, Colorado,  
for the Charging Party.*

DECISION

Statement of the Case

JOHN T. CLARK, Administrative Law Judge. This case was tried in Buffalo, New York, on 15 dates between February 11 and July 16, 2002. On charges<sup>1</sup> filed by the Paper, Allied-Industrial, Chemical and Energy Workers, International Union (PACE) and its Local 1-6992 (the Local, here after collectively referred to as the Union), the Regional Director for Region 3 of the National Labor Relations Board, issued a consolidated complaint and amended complaints<sup>2</sup> alleging that E.I. du Pont de Nemours & Co. (the Respondent) committed violations of Section 8(a)(1) and (5) of the National Labor Relations Act. The Respondent timely filed answers denying any violations.

On the entire record, including my observation of the demeanor of the witnesses, and

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<sup>1</sup> The original charges were filed, and amended, as follows: Case 3-CA-22854 on December 28, 2000, and amended on March 19, April 9, June 21 and 26, July 17, and August 24, 2001; Case 3-CA-22957 on March 5, 2001, and amended on May 14; Case 3-CA-23066 on May 14, 2001, and amended on June 21 and July 17; Case 3-CA-23275 on September 13, 2001, and amended on November 9 and December 13, 2001.

<sup>2</sup> The original complaint was issued on August 30, 2001. Amended complaints were issued on November 16, 2001, and January 25, 2002. As fully set forth herein counsel for the General Counsel withdrew a portion of par. IX(h) of the second amended consolidated complaint by letter dated October 10, 2002.

after considering the briefs<sup>3</sup> filed by counsel for the General Counsel, the Respondent, and the Charging Party, I make the following

## Findings of Fact

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### I. Jurisdiction

The Respondent, a corporation, manufactures Tedlar Film and Corian products at its facility in Tonawanda, New York, where it annually purchases and receives goods valued in excess of \$50,000, directly from points outside the State of New York. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

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### II. Background

#### *A. Respondent's Business Operations*

The Respondent's Tonawanda, New York facility also known as the "Yerkes" site, manufactures only two products, Tedlar and Corian. The Respondent divides its businesses into strategic business units (SBUs). Tedlar is part of the fluoroproducts SBU and Corian is part of the solid surfaces SBU. Tedlar and Corian are produced in separate areas of the facility. Tedlar is a polyvinyl fluoride film used to laminate a variety of surfaces including aircraft interiors, home siding, and roofing. It has additional industrial applications, such as reducing corrosion on tractor-trailers and printed circuit boards. Corian is a trademark solid surface material used in kitchen, bath, and recreational applications. The Corian product is manufactured in two forms: Corian sheet, which is used for countertops and other flat surfaces, and Corian shapes, which are primarily sinks and bowls. Sheet is made by pouring, or casting, the Corian mix onto a stainless steel belt. Shapes, the sinks and bowls, are made by pouring the Corian mix inside a variety of molds. The molded shapes are then "milled" by mill operators, who are bargaining unit employees. The mill operators remove the flange, or outer edge, and drill drain holes in the shapes. After milling, the shapes are sanded or "finished." This operation is performed by employees classified as class 2 top finishers, using hand sanders to remove any blemish or unevenness from the shape. The milling and finishing work is done in the Corian closed mold casting (CCMC) department, where the sinks, bowls, and integrated tubs and bowls are manufactured.

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#### *B. Collective-Bargaining History Until January 12, 2001*

The Respondent's employees have been represented by a labor union for over 60 years. The predecessor to PACE, the current labor organization, was the Buffalo Yerkes Union (BYU). During all relevant periods the appropriate bargaining unit (Unit) has been all production and maintenance employees at the facility, including plant clericals, analysis, and CCMC finishers. At the time of the hearing there were approximately 400 unit employees represented by PACE.

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In 1977, the Respondent and the BYU signed a collective-bargaining agreement containing an "evergreen" clause. This clause allowed the collective-bargaining agreement to

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<sup>3</sup> The Respondent and Counsel for the General Counsel filed motions to correct the transcript. Counsel for the General Counsel's motion is granted except that the correction at Tr. 650 is at L. 6.

remain in effect from year-to-year, unless either party gives notice to terminate, modify, or change the agreement. In accordance with the evergreen clause, since at least 1985, wages have been negotiated annually, at the request of one party or the other, in November. Benefits have been negotiated, on an ad hoc basis.

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In September 1993, the Respondent notified the BYU that it was terminating the collective-bargaining agreement effective December 7, 1993. Although the parties engaged in negotiations for a successor agreement, none was reached and the Respondent declared impasse and implemented its final offer in September 1994. The final offer eliminated health maintenance organizations from the health plan, and "pyramiding," which required the Respondent to pay overtime for all hours worked over 40 in a week and 8 in a day.

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In 1994, the BYU filed unfair labor practice charges regarding, among other things, the Respondent's implementation of its final offer. Bargaining was suspended while the charges were pending. After the Board issued a complaint the parties entered into an informal settlement agreement in February 1997. The agreement required the Respondent to rescind changes to the pyramiding of overtime, and to maintain the healthcare premiums at the 1996 level, until agreement or a good-faith impasse in bargaining was reached. The Respondent additionally paid each unit employee \$1000, 60 percent of the overtime backpay owed, and reimbursed the unit employees 100 percent of the healthcare premium increases.

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In 1995, between the time after the Respondent implemented its final offer, but before the settlement agreement was reached, the Respondent decided to return the shape finishing work to the facility. The finishing work had previously been performed at the facility from the introduction of the Corian shapes in the 1970s until 1985, when the work was moved to offsite subcontractors. Subcontractors did the work until 1995, when the Respondent began a dialogue with the BYU to return the finishing work to the facility because of quality control issues it had with the subcontractors. The Respondent told the BYU that a new, lower labor grade, had to be negotiated because the current, lowest grade, was not economically feasible. The BYU, in exchange for a lower wage rate for finishing work, gained steady employment. During this time the Respondent also stated its belief that technology eventually would eliminate the need for the milling and finishing of the shapes. The first CCMC finisher agreement (also called the class II agreement) was signed on August 4, 1995. The agreement creates a lower paying finishing position as well as setting a goal that at least 85 percent of the finishing work would be done onsite. After the first year either party could terminate the agreement with 120 days notice. The agreement is silent regarding milling work.

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The parties resumed negotiations for a successor contract after signing the informal Board settlement agreement. In December 1998, the Respondent again presented a final offer that included a proposed CCMC finisher agreement. In February 1999, the unit employees voted to reject the 1998 final offer. The Respondent neither declared impasse nor implemented its final offer, but resumed negotiations with the BYU on March 3, 1999.

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In June 1999, the BYU affiliated with PACE and was recognized by the Respondent as the unit employees collective-bargaining representative. Since then the parties have met in two forums, contract negotiations and executive board (also called executive committee) meetings. At contract negotiations PACE International Representative James Briggs is the chief negotiator and spokesperson for the union negotiating committee. Area Human Resources Superintendent Anthony Casinelli represents the Respondent. Executive board meetings are convened at the call of either party, and generally deal with day-to-day issues. The same individuals represent the Union at the executive board and contract negotiation meetings, except for Briggs. The Respondent's representative is Area Employee Relations

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On February 28, the Respondent terminated the 1995 CCMC finisher agreement effective June 29, 2001. The Respondent's notice to the Union attributes the need to terminate the agreement to business conditions necessitating the acceleration of its "efforts to implement new technology to improve the Shape Casting process and eliminate the need for Finishing the bowls following casting" (GC Exh. 21). Casinelli met with the union executive board on February 28. Local Union President Gary Guralny credibly testified that Casinelli told the union executive board that the process to eliminate the need for milling and finishing would be in place in 12 to 18 months. There was no mention of subcontracting of the milling and finishing work during the interim period.

Guralny testified that the Respondent's sudden announcement of its intention to terminate the CCMC finisher agreement raised a number of concerns and questions for the Union. The foremost concern was for the job security for the employees who performed the finishing work. The Union believed that the necessary technology could not be developed and implemented before the termination of the agreement. This belief was premised on the fact that although the Respondent had predicted the eventual existence of this technology, since at least 1995, it was only a month before that the Respondent had told the Union that it was just beginning to attempt to develop the technology. The Union also realized that with the termination of the agreement the Respondent would lose the benefit of the special, reduced wage rate, for finishing work and the employees would lose the work retention protection, thereby allowing the Respondent to subcontract all the finishing work. In an attempt to ascertain the Respondent's plans, and to alleviate its own concerns, the Union presented an information request to Employee Relations Superintendent Debbie Brauer on March 6, 2001 (GC Exh. 22). The request asked for information concerning the impact that the termination of the CCMC finisher agreement would have on the milling and finishing work.

The Respondent withdrew its CCMC finisher proposal from its final offer during the March 19 contract negotiation session. The Respondent announced that CCMC proposals would not be discussed at contract negotiation meetings. The Union requested an explanation and the Respondent explained that because there was no proposal on the bargaining table concerning finishing, there was nothing to discuss. The Respondent further claimed that the "rest of the issues of discussion have to do with day to day operations." These other issues related to union questions regarding removal of the milling and finishing equipment from the facility and the number of affected employees. The Respondent also stated that in January it anticipated that the milling positions would also be eliminated. The Union stated, "[T]hey would give that some thought." (GC Exh. 52.)

In an effort to continue discussing the CCMC issues at contract negotiations, the Union prepared a proposal to alleviate a bottleneck in the finishing process that the Respondent had previously identified. This proposal was presented to the Respondent at the March 23, 2001 contract negotiation session. Casinelli, the Respondent's spokesperson, rejected the proposal contending that it made no sense because the Respondent did not expect any future need for finishing work after the implementation of the new technology. Briggs, the union spokesperson, asked what would happen if the technology did not work. Casinelli said that a team was "looking at that." Briggs asked to talk with the team "at our next meeting." Casinelli said that he had told the union executive board that they would receive an update, but that there would be no update "at contract." Briggs said, "This is part of contract. If you tell us there will be no lost jobs it may not be an issue. If you can say that on 6-29-01 no bowls will be finished or milled then OK. Until then we need an agreement to assure that this work won't go off-site." Casinelli replied, "From a negotiation perspective, you have our final offer. CCMC staffing we'll discuss. Having that team come to contract is not necessary."

On April 2 du Pont corporate headquarters announced a corporate transformation plan, which included a restructuring in some business areas. The stated objective was to improve competitiveness. Plant Manager Adams conveyed the announcement, by memo, to all employees. Adams added that the need to improve the competitiveness of the shape business was of being focused upon at the facility. In that regard, he wrote that teams were working to improve the technology, and that a feasibility study was underway to determine if subcontracting the milling and finishing work would provide a business advantage while transitioning to the improved technology (GC Exh. 28). Although Adams not only knew about the transformation plan a month before the announcement, and had taken action to have the facility participate in it, he was not at liberty to share his knowledge. The first notification that the Union received regarding either the transformation plan or the feasibility study was during this April 2 meeting. Adams admitted that the feasibility study was part of the “positioning,” to take part in the transformation plan, as was the notice to terminate the CCMC finisher agreement.

An executive board meeting had been previously scheduled, at the Respondent’s request, for April 5. Although the Union maintained that all CCMC issues should be addressed in contract negotiations, it was clear that the subcontracting of all the milling and finishing work would have a severe impact on the unit employees. Because of the importance of the issue the union negotiating committee decided that it had to go forward. In keeping with that decision International Representative Briggs attended the April 5 executive board meeting.

At the meeting, Brauer, the Respondent’s spokesperson, told the Union that the feasibility study, which it had announced only 3 days earlier, was completed and showed that subcontracting the milling and finishing work would save \$1 million in a 12 month period. The Respondent proposed that unless the Union could offer a comparable plan, all the milling and finishing work would be subcontracted by June 29, 2001, and all of the class 2 finishers as well as the milling operators would no longer perform those jobs. Regarding those employees, the Respondent proposed granting them severance benefits under its corporatewide career transition plan but only if the Union agreed to that plan by April 26. The Respondent justified this self-imposed deadline by explaining that if the “transition” costs were incurred during the second quarter of 2001, they would be charged at the corporate level, not the local site.

Also during this meeting, Brauer stated that as a result of the subcontracting plans, a new position called “material handler” needed to be created. She said that the parties would talk about this position at a separate forum. The Union protested that its committee would address the issue—not another committee, in yet another forum (presumably the “job-ad” committee).

Only a week later, on April 12, the Respondent, while still negotiating its subcontracting decision, declared impasse in the successor contract negotiations and stated that it would implement its final offer on April 23. During an April 16 executive board meeting, the Respondent announced that it had moved up the date for subcontracting the milling work from July 1 to May 1, 2001, thereby leaving the Union with only approximately 15 days to formulate a plan saving the Respondent \$1 million over a 12-month time period using only labor costs. On April 23, 2001, the Respondent implemented its April 12 final offer.

#### 1. Positions of the parties

On October 10, 2002, counsel for the General Counsel sent a letter to me, with copies to the parties, correcting the pleadings. Counsel for the General Counsel wrote, in part:

[c]ontrary to [(paragraph IX(h) of the Second Amended Consolidated Complaint, GC Exh. 1(mm)] as it now appears in the complaint Counsel for the General Counsel does **not** contend that Respondent's April 12, 2001, declaration of Impasse was tainted by [two allegations of failing to provide information]. Accordingly, Counsel for the General Counsel seeks to withdraw that portion of the complaint. . . . Paragraph IX(h) would thus now read as follows:

(h) On or about April 12, 2001, Respondent prematurely declared an impasse in bargaining for a successor agreement and announced it would implement its final offer on April, 23, 2001, notwithstanding its failure to reach a good faith impasse in bargaining regarding the subcontracting of milling and finishing work on Corian bowls described above in paragraphs IX(d) and (e).

Accordingly, counsel for the General Counsel's theory of this portion of the case is that the Respondent committed a serious unfair labor practice when it unlawfully fragmented the CCMC and subcontracting issues from the overall contract negotiations. Because a lawful impasse can not coexist with a serious, unremedied, unfair labor practice, the Respondent's April 12 declaration of impasse was tainted and the April 23 implementation of the its final offer, as well as the its unilateral decision to subcontract the milling and finishing work, was unlawful.

The Union's brief generally supports counsel for the General Counsel's position in all aspects. Where it is inconsistent, such as in this section, it has been ignored (see, e.g., U. Br. at 6, 75). It is well established that the General Counsel's theory of the case is controlling, and the Union can not enlarge upon or change that theory. *D&F Industries*, 339 NLRB No. 73, slip op. at 4 fn. 15 (2003).

The Respondent contends that the bifurcating of the milling and finishing subcontracting issue was consistent with the past practice and that the Union "readily acquiesced" (R. Br. 33). Respondent argues that the "impasse is barred **only** if the General Counsel demonstrates a casual connection between the unfair labor practice and the subsequent deadlock" (R. Br. 28-29). The casual connection cannot be made because the parties lawful bifurcation of the negotiations did not "increase friction at the contact table." (R. Br. 29.) Thus, in the Respondent's view because the Union's acquiesced in the decision to discuss the issues separately, counsel for the General Counsel's theory is fatally defective (R. Br. 41).

## 2. Discussion and analysis

Counsel for the General Counsel submits that the subcontracting of milling and finishing work is a mandatory subject of bargaining under the Act. During the hearing the Respondent contended that there was no obligation to bargain because a large part of the savings had nothing to do with labor and benefit costs (Tr. 1308). That argument appears to have been abandoned by the Respondent in its brief. Regardless, it is well established that the decision to subcontract and transfer work outside the bargaining unit is a mandatory subject of bargaining. *Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203 (1964); and *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

Equally well established is that an employer violates its statutory duty to bargain in good faith about mandatory subjects of bargaining when it reduces the range of possible compromises by rigidly and unreasonably fragmenting negotiations. *Trunbull Memorial Hospital*, 288 NLRB 1429, 1446-1447 (1988), or where the employer has a fixed determination to implement its proposals regardless of the status of negotiations. *Howard Electrical & Mechanical*, 293 NLRB 472, 476 (1989). Counsel for the General Counsel relies on *E. I. du*

*Pont & Co.*, 304 NLRB 792 (1991), [hereafter *du Pont (Spruance)* because it involved the Respondent's Spruance plant, located in Amphill, Virginia], as representing the foregoing principles.

5           *Du Pont (Spruance)* involves a strikingly similar fact pattern. There the employer insisted that two of its proposals, one concerning a "site service operator," and the other pertaining to "technical assistants," although mandatory subjects of bargaining, were not part of the negotiations for the collective-bargaining agreement. There, as here, the employer also alleged a claim of urgency. Although the parties in *du Pont (Spruance)* strenuously maintained their positions, the employer did negotiate over the site proposal at the same sessions where contact proposals were discussed. It was not until a critical juncture in the bargaining process, when the employer refused to consider a proposed compromise between the two proposals, that the administrative law judge found that the employer had approached the bargaining table with a fixed determination to implement its proposals regardless of the status of negotiations. Id. at 802.

20           In the instant case, there is sufficient evidence to reach the same conclusion. In early January 2001, there are communications between high-level corporate officers, requesting assurances that negotiations will allow the Respondent to shut down or change significantly the shape operation. Casinelli confirmed that the Respondent would not enter into negotiations that would impact "this" project. Although Plant Manager Adams stated that "this" project involved the development of new technologies, the communications raise the specter that new technology would have a major impact on those employees working in the shape operation. This would certainly be true should the technology achieve the level that the Respondent had long anticipated—removing the need for milling and finishing operators. At the very least, when the Respondent submitted its final offer on January 12, 2001, an offer that contained a CCMC agreement, it was determined not to enter into any negotiations regarding the shape operation that would in anyway limit its ability to shut down or change significantly the shape operation in the future. The Respondent's determination to not limit its options was reinforced when Adams learned of the corporate-wide restructuring plan in early February 2001 (Tr. 1049). Adams immediately began to position the facility in order to participate in the plan, should he decide to so. One advantage to participating in the plan was that certain employee severance costs would be charged to the corporate headquarters, rather than the facility. In anticipation of participating in the restructuring plan, Adams told Casinelli to announce, on February 28, the Respondent's intention to terminate the CCMC agreement in 120 days. There remained outstanding, however, the January 12 final offer that contained a proposed CCMC agreement. It was imperative that the Respondent withdraw that proposal, and keep the milling and finishing issues out of contract bargaining. Adopting this strategy would enable the Respondent to negotiate the subcontracting of the milling and finishing work, should it decide to do so, comply with the corporate restructuring timetable, declare impasse on April 12 in overall contract bargaining, and implement its final offer on April 23. Based on the foregoing I agree with counsel for the General Counsel's contention that the Respondent demonstrated a "fixed determination" to implement its final offer in contract bargaining while still maintaining the flexibility to achieve an advantageous decision in bargaining over a major subcontracting issue.

45           It is also apparent that in *du Pont (Spruance), supra*, there was an outright refusal to consider the union's proposed compromise. The Board's explicit finding, however, leaves no doubt as to the basis for the violation:

50           In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally implementing its . . . proposal, we emphasize the Respondent's course of fragmented bargaining. The Respondent insisted throughout the

5 course of negotiations that its . . . proposals were not part of the negotiations for the  
collective-bargaining agreement. It is [sic] also insisted that these proposals be separate  
from each other. It is well settled that the statutory purpose of requiring good-faith  
bargaining would be frustrated if parties were permitted, or indeed required, to engage in  
10 piecemeal bargaining. See *Sacramento Union*, 291 NLRB 552, 556 fn. 17 (1988), and  
cases cited there. What we find unlawful in the Respondent's conduct was its adamant  
insistence throughout the entire course of negotiations that its . . . proposals were not  
part of the overall contract negotiations and, therefore, had to be bargained about  
15 totally separately . . . from all the other collective-bargaining agreement proposals. We  
find this evinced fragmented bargaining in contravention of the Respondent's duty to  
bargain in good faith. [304 NLRB 792 fn. 1.]

15 The Respondent does not specifically address *du Pont (Spruance)*. Perhaps this is  
because it contends, contrary to the situation in *du Pont (Spruance)*, that "the Union willingly  
acquiesced in the Company's position that milling and finishing subcontracting should be  
addressed in separate negotiations; and the Union did so in order to get on with the bargaining  
of this important subject, rather than 'quibble' about the forum." (R. Br. at 31.)

20 The Respondent's contention is based in part on the parties' past practice of negotiating  
issues unrelated to contract language, independent of contract bargaining. As one example the  
Respondent cites the first CCMC finisher agreement (also called the class II agreement), which  
was signed on August 4, 1995. Counsel for the General Counsel argues, correctly, that that the  
parties may, and did, mutually agree to discuss issues away from the contract bargaining table.  
25 Counsel for the General Counsel contends that there was no agreement, implied or otherwise,  
regarding fragmenting negotiations for a current CCMC finisher agreement, or the  
subcontracting issues related to the milling and finishing work. Even had the Union previously  
acquiesced, that does not act as a waiver for all time. *Ciba-Geigy Pharmaceuticals Division*,  
264 NLRB 1013, 1017 (1982), *enfd.* 722 F.2d 1120 (3d Cir. 1983). The CCMC Finisher  
30 agreement was part of the Respondent's two final contract offers. The Respondent cannot  
unilaterally refuse to discuss the CCMC finisher agreement, and the subcontracting issue, in  
isolation from the other contract issues, merely because it terminated the current CCMC finisher  
agreement and withdrew its proposed CCMC finisher agreement from its last final contract offer.

35 Counsel for the General Counsel submits that there is a presumption that the Union had  
not abandoned its right to good-faith bargaining, which includes the absence of fragmented  
bargaining. *Pertec Computer Corp.*, 284 NLRB 810, 817 (1987); *du Pont (Spruance)*, *supra*. A  
"clear and unmistakable waiver" is necessary in order to rebut the presumption. *Metropolitan  
Edison Co. v. NLRB*, 460 U.S. 693, 798 (1983). Although a union's waiver of a statutory right  
40 may be implied from the parties' past practice, such a waiver is not lightly inferred by the Board.  
See, e.g., *Rockwell International Corp.*, 260 NLRB 1346, 1347 (1982). "Further, when relying  
on a claim of waiver of a statutory right, the employer bears the burden of proving that a clear  
relinquishment of that right has occurred." *Wayne Memorial Hospital Assn.*, 322 NLRB 100, 104  
(1996), citing *NLRB v. Challenge-Cook Bros. of Ohio*, 843 F.2d 230, 233 (6th Cir. 1988). To the  
45 extent that the Respondent is attempting to meet its burden by arguing that the Union never  
made a written objection to the Respondent's fragmentation of the bargaining subjects (R. Br.  
34), it has failed to meet its burden. The Respondent also contends that "each party made a  
conscious and knowing decision to bifurcate the subcontracting negotiations from the bargaining  
at the main contract table" (R. Br. 37). To test the accuracy of that contention the negotiation  
50 minutes and the related testimony must be reviewed.

*a. The contract bargaining meeting of March 19, 2001*

5 The complaint alleges that on March 19, 2001, the Respondent refused to bargain over  
 the milling and finishing work as part of collective-bargaining negotiations for a successor  
 agreement and insisted that this issue be discussed in separate negotiations. The  
 Respondent's notes from the March 19 contract bargaining meeting are General Counsel's  
 Exhibit 52 (R. Exh. 46, which was withdrawn, is the same document, Tr. 1324). The Union's  
 10 notes are General Counsel's Exhibit 53. The parties do not argue that the notes are  
 inconsistent, but, the Respondent's notes appear more thorough and I have relied more heavily  
 on them. They state, in relevant part, that because the Respondent had given the Union the  
 120-day notice of intent to terminate the CCMC agreement, the Respondent was now  
 withdrawing its proposed CCMC agreement from its final offer. Any information requests  
 relative to CCMC would be handled outside of contract bargaining. In response to the Union's  
 15 statement that it could still make an offer, the Respondent replied, "[T]hey did not say that they  
 would not bargain." The Union asked why the Respondent withdrew the CCMC proposal. The  
 Respondent said that it expected that the improved technology would eliminate the need for  
 milling and finishing work by January. In response to additional questions about the milling and  
 finishing work the Respondent said that the process "will be talked about outside of contract  
 20 bargaining negotiations." That the Respondent "would be willing to talk outside of contract  
 about it. That [the] whole discussion belongs outside of contract bargaining."

In response to a union question as to why CCMC was not being discussed at contract  
 bargaining, the Respondent stated that "there is no proposal on the table, so it is not being  
 25 discussed during contract." "The rest of the issues of discussion have to do with day to day  
 operations" (GC Exh. 52). International Representative James Briggs, the chief negotiator and  
 spokesperson for the Union negotiating committee, replied that "they would give that some  
 thought."

30 The Respondent's minutes of the March 19 meeting disclose that the Respondent made  
 it clear, on several occasions, that any discussion relative to CCMC, including responding to  
 information requests, would only take place outside of contract talks (GC Exh. 52). It is equally  
 apparent that when Briggs stated that the Union "would give that some thought" that the Union  
 had not agreed with the Respondent's position. Briggs credibly testified that one of the items he  
 35 wanted to think about was the Respondent's last statement on the matter, indicating that the  
 Respondent took the position that it did because "there is no proposal on the table, so it was not  
 being discussed during contract." Any possible inconsistency was resolved during the March 23  
 meeting.

40 *b. The contract bargaining meeting of March 23, 2001*

The Union, correctly as the evidence shows, did not believe that the Respondent's  
 technology would be sufficiently advanced to remove the need for milling and finishing work  
 45 before the expiration of the CCMC agreement. Based on this belief, during the March 23  
 contract negotiations meeting, the Union presented its CCMC "helping hands" proposal.  
 Although the proposal was intended to alleviate a bottleneck in the finishing process, it had an  
 additional, even more important purpose—to keep the CCMC issues on the contract  
 negotiations bargaining table (Tr. 802).

50 Casinelli rejected the CCMC "helping hands" proposal. By rejecting that proposal the  
 Respondent rejected even the remotest possibility (that became a reality) that the new

technology, technology that the Respondent had heralded years before, would not be available before the expiration of the CCMC agreement. Casinelli also refused to allow the team developing the technology to talk with the union contract negotiators. Briggs insisted that the issue was part of the contract talks. He argued, prophetically, that an agreement was needed to assure that the work would not go off-site (GC Exh. 27). Casinelli maintained that the Union had the final offer, that he would only discuss CCMC staffing, and that it was unnecessary for the technology team to attend the contract negotiations. Briggs said he was shocked by Casinelli's response. Any possible ambiguity that the Respondent had fragmented the bargaining subjects was removed at this meeting. Not only is it clear that the Respondent insisted on fragmenting the collective-bargaining negotiations, but it did so without any reference, express or implied, that its pronouncement was consistent with an "Evergreen contract," past practice, or any prior agreement.

*c. Respondent's April 2 announcement and the April 5 executive board meeting*

On April 2, Adams announced the corporate transformation plan to the facility. He also announced that the Respondent was conducting a feasibility study to determine if subcontracting the milling and finishing work would provide a business advantage while transitioning to the improved technology (GC Exh. 28). Although this was news to the Union, Adams was aware of the transformation plan about a month before this announcement. He also admitted that the notice terminating the CCMC agreement, the withdrawal of the CCMC proposal, and the initiation of the feasibility study, were all part of the Respondent's efforts to position itself to participate in the transformation plan.

International Representative Briggs was asked by the union executive board to attend its April 5 meeting with the Respondent. Briggs had previously only participated in contract negotiations, where he was the spokesperson. Local Union President Guralny testified that Briggs was asked to attend because importance of the CCMC issue. Although the union negotiation committee believed that the issue should be discussed in contract negotiations, it "wanted to do something as fast as we could," and thus decided that they were not "going to fight with management" over the forum (Tr. 506).

The Respondent announced at this meeting that its feasibility study showed that subcontracting the milling and finishing work would save \$1 million over 12-8 months. The Respondent additionally declared that unless the Union offered a plan with comparable savings, all the milling and finishing work would be subcontracted by June 29 (this date was later changed to July 1). The initial estimate was that the subcontracting would result in a permanent lost of 53 jobs. The Respondent proposed that those employees who lost their jobs could qualify for benefits under the corporate severance plan. This plan was called the career transition plan and its benefits were more generous than the severance plan at the facility. The Respondent alleged that for the transition costs to be absorbed at the corporate level they had to be incurred during the second quarter of 2001, thus the Union had only until April 26 to accept the career transition plan. (GC Exh. 30.)

It was also at this meeting that Debbie Brauer, the Respondent's employee relations superintendent, and its spokesperson at the executive board meetings said "[w]e'll talk at a separate forum about a new position called material handler" (GC Exh. 30). This new position was necessary because of the Respondent's plans to subcontract the milling and finishing work. Guralny testified that he objected to the Respondent dictating that bargaining be conducted in yet another forum (Tr. 512-516). This position, and the salary for the position, was negotiated at executive board meetings at some point after the Respondent implemented its final offer (Tr. 832).

*d. The April 12 and 16 executive board meetings*

5           On April 12, the Respondent, while still negotiating the subcontracting decision, declared impasse in the contract negotiations, and announced that it would implement its final offer on April 23. The Union disputed the impasse, both at the meeting, and in a letter (R. Exh. 33), but to no avail. The Respondent implemented its final contract offer on April 23.

10           At the April 16 executive board meeting Brauer stated that the Respondent had moved the start date for the subcontracting of the milling work from July 1, 2001, as previously announced, to May 1. This left the Union with only 15 days to prepare a proposal that would save the Respondent \$1 million, but without being permitted to engage in the normal—indeed required—give and take of the collective-bargaining process regarding the remaining issues on  
15 the bargaining table.

          In presenting events of April 16, counsel for the General Counsel offered General Counsel's Exhibit 38B as the Union minutes of that meeting. The last entry of that exhibit contains the following dialog between Briggs and Brauer. Briggs: "Can't respond by tomorrow—we should have talked about subcontracting in contact bargaining." Brauer: "That's done—we already implemented terms of contract—7:00—9:30 tomorrow." As counsel for the General  
20 Counsel began his questioning regarding this exhibit, it became apparent that there was another version of the union minutes of that meeting. In that version, General Counsel's Exhibit 38A, the last entry has Briggs saying, "Can't respond by tomorrow" and Brauer responding, "7:00—  
25 9:30 tomorrow."

          Guralny, who attended the meeting, corroborated Briggs' testimony that General Counsel's Exhibit 38B was accurate. Briggs further testified that he had seen General Counsel's Exhibit 38A in the Union office 6 to 8 weeks after the meeting. Briggs instructed the union secretary to correct those minutes to comport with his, Briggs', recollection. His version is  
30 General Counsel's Exhibit 38B. Brauer credibly denied making the statement concerning implementation contained in General Counsel's Exhibit 38B. The Respondent's minutes of the meeting corroborate her testimony (R. Exh. 16). I find Brauer's recollection, supported by the Respondent's minutes, to be more reliable than the recollections of Guralny and Briggs, as memorialized in General Counsel's Exhibit 38B. I reject, however, the Respondent's conclusion  
35 that the testimony of Guralny and Briggs should be totally discredited, and the complaint dismissed, based on my finding that Brauer's recollection is more reliable.

*e. Events after the Respondent's April 23 implementation of its final offer*

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          On April 30, the Respondent sent the Union a letter outlining the actions it was taking to implement its final offer (GC Exh. 40), notified the Union that on June 30, 53 positions at the facility would be eliminated (GC Exh. 41), and sent another letter to the Union stating that in the  
45 absence of a union proposal to save the Respondent \$1 million, subcontracting of the milling and finishing work would begin on May 1 (GC Exh. 42). On May 1, the Respondent declared an impasse in bargaining over the milling and finishing work and implemented its subcontracting (GC Exh. 43). At this point, there had been approximately 10 meetings concerning the subcontracting of the milling and finishing work. After impasse was declared there were 16  
50 executive board bargaining meetings over the effects of the subcontracting decision. Although employees worked in the CCMC department after July 1, all milling and finishing work was sent offsite to subcontractors.

*f. Conclusions*

5 Except as previously noted the bargaining sessions concerning the subcontracting of the  
milling and finishing work were conducted in executive board meetings and attended by the  
union negotiating committee. I have rejected the Respondent's contention that the absence of a  
written protest by the Union regarding the Respondent's unilateral fragmentation of the  
bargaining issues is evidence that the Union agreed, or waived its right, to bargain about all  
10 mandatory subjects of bargaining in a single forum. I also do not find that the attendance of the  
union negotiating committee at the executive board meetings is sufficient to demonstrate that  
the Union acquiesced to the Respondent's unilateral fragmentation of the bargaining issues.

15 The Respondent's unilateral fragmentation of the bargaining issues, in conjunction with  
its self-imposed deadlines, put the Union in the unenviable position of being stuck between the  
proverbial "rock and a hard place." The Union reasonably decided that it could better serve its  
members by using the limited time available to assess the validity of the Respondent's feasibility  
study, and try to construct a merged proposal of contract and the subcontracting issues. The  
subcontracting issue was of primary importance to the Union. The Union's goal was to convince  
20 the Respondent not to subcontract the work, or to at least minimize the amount of work that was  
subcontracted. In order to have the slightest chance of accomplishing either goal the Union had  
to meet with the Respondent under the conditions imposed by the Respondent. As set forth  
above, the Union did protest the fragmentation of the bargaining issues, and each time it was  
rebuffed by the Respondent. There was nothing more the Union could do, and in any case, the  
burden of proving waiver remains with the Respondent. *Wayne Memorial Hospital Assn.*, 322  
25 NLRB 100, 104 (1996).

30 I also do not attribute any significance to the testimony of Briggs and Guralny indicating  
that eventually the Union intended to submit a merged proposal containing both contract and  
subcontracting issues. The Union always viewed the CCMC issues as part of contract  
negotiations. Even after the Respondent announced that it was terminating the CCMC  
agreement, and withdrew its CCMC proposal from its final offer, the Union offered a "helping  
hands" proposal in contract negotiations. Once the Respondent provided the Union with its  
feasibility study it was readily apparent that a saving of \$1 million, an amount equal to about 3  
35 percent of the economic package that was on the contract bargaining table, could not be attained  
solely by reducing the labor cost attributable to the milling and finishing employees. I find that  
the Union's intent to submit a merged proposal was—like its attendance at the executive board  
meetings—a consequence of the Respondent's unilateral action. The origin of the Union's  
intentions and actions was necessity, not acquiescence.

40 The Respondent also contends that it would entertain any union proposals at either  
table. I am uncertain as to the specific conduct that statement entails, but I have no doubt that it  
does not encompass bargaining in good faith. If it did, the Respondent would not have  
unilaterally fragmented the subcontracting issues at the outset. The Respondent consistently  
exhibited a "fixed determination" to implement its final offer in contract bargaining while  
45 maintaining the flexibility to achieve an advantageous decision in bargaining over a major  
subcontracting issue. It could not achieve this objective and allow the CCMC/subcontracting  
issue to remain part of contract bargaining. Moreover, to place the onus on the Union for failing  
to present a merged bargaining proposal, under the circumstances of this case, is essentially  
requiring the Union to remedy the Respondent's unfair labor practice.

50 The milling and finishing issues were part of the parties contract negotiations. The  
Respondent's initial final contract offer included the CCMC finisher agreement, which was a

5 result of those contract negotiations. Additionally, the Respondent's final contract offer contained terms and conditions of employment for those milling employees who were not covered by the CCMC finisher agreement. The Respondent failed to bargain in good faith when, on March 19, 2001, it rigidly and unreasonably fragmented the negotiations by refusing to discuss finishing work in contract negotiations. The Respondent repeated this conduct when it unilaterally insisted fragmenting the negotiations for the subcontracting of the milling and finishing work. The Respondent, by its unilateral action, deprived the Union of engaging in "horse trading" or "give and take" bargaining that characterizes good faith bargaining. *E. I. du Pont & Co.*, 304 NLRB 792 (1991); *Sacramento Union*, 291 NLRB 552, 556 (1988).

10 The waiver of a statutory right—here the Union's right to bargain milling and finishing issues along with all other contract bargaining issues—is not lightly inferred by Board. The waiver must be "clear and unmistakable." *King Soopers, Inc.*, 340 NLRB No. 75 (2003) (quoting *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983)). The waiver of a statutory right may be implied by reviewing a variety of factors, including the parties' bargaining history, past practice, or both. The party asserting that the waiver of a statutory right has occurred, has the burden of proving a clear relinquishment of that right. *Philadelphia Coca-Cola Bottling Co.*, 340 NLRB No. 44 (2003). The Respondent has not met its burden. Accordingly, I find that the Respondent refused to bargain over milling and finishing work on Corian bowls as part of collective-bargaining negotiations for a successor agreement, and insisted on bargaining over milling and finishing in separate negotiations, by this conduct the Respondent violated Section 8(a)(1) and (5) of the Act.

25 (1) The effect of the unfair labor practice on the impasse

30 In the absence of a lawful good-faith impasse, an employer may not unilaterally implement its final offer. A lawful good-faith impasse cannot be reached in the presence of unremedied unfair labor practices that affect the negotiations, and, thus, taint the asserted impasse. E.g., *Titan Tire Corp.*, 333 NLRB 1156, 1158 (2001), and cases cited. The remaining question is, did the Respondent's insistence that the CCMC issues be negotiated separately from the other bargaining issues, affect the negotiations to such a degree as to taint the impasse. I find, for the reasons set forth below, that there is a causal connection between the Respondent's fragmentation of the bargaining subjects and the overall contract negotiations.

35 The Respondent's claim of impasse is based on the parties failure to resolve two major issues, one concerning health care, and the other overtime pay. To the extent that this representation is an accurate picture of the status of negotiations before the Respondent's fragmentation of the bargaining subjects, I agree. The Respondent wanted to institute a self-insured managed health care plan. This proposal not only lowered the cost of employee health care, but passed on a larger share of the remaining costs to the employees. The Respondent's overtime proposal was to eliminate the contractual double overtime "pyramid" provisions whereby the employees receive premium pay for all hours worked over 40 in a week, and 8 in a day. Both issues presumably involve significant economic concessions for the employees, and economic gains for the Respondent.

45 As set forth above, on March 19, 2001, the Respondent modified its final last offer by withdrawing its CCMC proposal regarding the finishing work and declaring that any discussion regarding the "whole process" belongs "outside of contract bargaining." This action, coupled with the Respondent's previous announcement that the existing CCMC agreement would be terminated, was a matter of concern and confusion to the Union. It was of concern because the withdrawn CCMC proposal, although not specifying the percentage of the milling and finishing work remaining onsite, at least stated an intention to have the work remain onsite [GC Exh.

18(c)]. It was confusing because CCMC issues had always been part of contract negotiations. The Union was left pondering the Respondent's intentions regarding the milling and finishing work, rather than remaining focused on the items of longtime dispute. As the Board stated in a similar situation, the Respondent's unlawful conduct "diverted the Union's attention away from negotiations." *Lafayette Grinding Corp.*, 337 NLRB 832, 833 (2002). In an attempt to ensure that the work would remain onsite, and to keep the CCMC issues as part of the contract negotiations, the Union developed the "helping hands" proposal. This proposal was developed, at least in part, as the result of the Respondent's unlawful fragmentation of the bargaining subjects. The wasted time and effort by the Union in developing the proposal, as well as the increased friction resulting from its summary rejection, had an adverse impact on the negotiations.

The greatest impact of the Respondent's unlawful fragmentation of the bargaining subjects, however, occurred after the Respondent announced that its feasibility study indicated that subcontracting the milling and finishing work would save \$1 million. It then challenged the Union to offer a comparable plan, but at the same time refusing to allow the Union to juxtapose the alleged savings contained in the feasibility study, to any concessions that the Union might consider regarding contract issues. This unlawful fragmentation deprived the Union of "give and take" bargaining, which frequently results in the parties moving away from previously long held positions, in an attempt at compromise. Because of other conduct by the Respondent, explained below, it cannot be determined with certainty that compromise would have resulted. Considering, however, that the decision to subcontract had the potential to cause the largest layoff in at least 17 years, it is not beyond the realm of speculation that were it not for the Respondent's fragmentation of the bargaining subjects a compromise may well have been reached.

Based on the foregoing, I find that the Respondent's adamant insistence that the CCMC issues, including the subcontracting of the milling and finishing work, were not part of the overall contract negotiations, and had to be bargained about separately from the other contract proposals, is a serious unfair labor practice that contributed to the parties inability to reach agreement. A lawful good-faith impasse cannot be reached in the presence of a serious unremedied unfair labor practice that affects the negotiations. E.g., *Titan Tire Corp.*, supra.

Accordingly, I find that on April 12, 2001, when the Respondent prematurely declared an impasse in bargaining for a successor agreement and announced it would implement its final offer on April 23, notwithstanding its failure to reach a good-faith impasse in bargaining regarding the subcontracting of the milling and finishing work on Corian bowls, the Respondent violated Section 8(a)(1) and (5) of the Act. It is also found that on April 23, 2001, when the Respondent unilaterally implemented terms and conditions of employment that were a part of its final offer, notwithstanding that the parties were not at a good-faith impasse in bargaining, the Respondent violated Section 8(a)(1) and (5) of the Act. The Respondent additionally violated Section 8(a)(1) and (5) of the Act when, on May 1, 2001, it commenced subcontracting milling work, and July 1, 2001, commenced subcontracting finishing work, on Corian bowls to Jaco and TFI.

#### *B. The General Counsel's Alternative Argument*

Counsel for the General Counsel argues in the alternative that, assuming the above conduct is lawful, the Respondent still violated the Act by implementing its decision to subcontract the milling and finishing work before reaching a valid good-faith impasse in bargaining over that issue. As evidence of the lack of a valid impasse, counsel for the General Counsel submits that the Respondent (1) failed to provide relevant information; (2) allowed

insufficient time to review necessary information; and (3) imposed effects bargaining while decisional bargaining was ongoing.

#### 1. The information request

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The following allegation, which counsel for the General Counsel submits as support for his alternative theory, is also alleged as an independent violation of the Act, separate and apart of any impact that it may have on the alleged impasse. Paragraph VIII(d) of the complaint [GC Exh. 1(mm)] is the allegation at issue, and a copy of the April 23, 2001 information request is attached to the complaint as exhibit D. It is also Respondent's Exhibit 17.

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The April 23 letter contains a few new information requests, but in large part it reiterates requests made on April 5 (GC Exh. 31) and 16 (R. Exh. 15). Counsel for the General Counsel submits that the Respondent failed to provide the following requested items contained in the April 23 information request [GC Exh. 1(mm) exh. D; R. Exh. 17]: 4(e) actual, hard cost per hour for health, pension, and life benefits, and disability insurance; 4(k) [in the second paragraph of item 4] actual labor cost for supervision in the bowl finishing area; 5(b) the total number of bowls finished since 1997, listed by style number and color, and the location where the finishing was performed; 5(d) the actual rate of damage for finishing onsite and finishing by "JACO" [a subcontractor] for 1994 through 2000; 5(e) all subcontracts for milling and finishing work from 1994 to the present; 5(g) "JACO Custom Grinding" compensation for 1997 through 1999; and 5(h) copy of the subcontracting quote mentioned at the April 16, 2001, meeting.

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##### *a. Facts*

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There is no dispute that on April 2, 2001, the Respondent informed the Union that it was studying the feasibility of subcontracting the milling and finishing work of the Corian bowls and shapes. In response to "communications and announcements," dated April 2, 2001, the Union gave the Respondent an information request at the April 5 executive board meeting. The stated purpose of the request was to "properly evaluate DuPont's basis for its decision to outsource (the parties use 'outsource' as a synonym for 'subcontract') and/or eliminate the milling and finishing jobs." This information was "essential to the Union's ability to properly determine the extent to which labor costs are a factor in DuPont's decision." The Union also stated that because the Respondent claimed that the subcontracting would result in heightened competitiveness, and greater efficiency and productivity, the information that was potentially relevant to those issues had to be provided (GC Exh. 31). The three-page request primarily seeks information about the transformation plan and the feasibility study. It requests copies of the plan and the study, along with "copies of any studies or other documents . . . that discuss, compare or contrast total costs [and various other factors] between outsourcing workers and bargaining unit personnel" (GC Exh. 31, par. 4). After receiving the request, the Respondent reported that its feasibility study demonstrated that a savings of \$1 million, over a 12-month period, would be achieved by subcontracting the work. The Union responded that it needed answers to the information request in order to bargain (Tr. 506).

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The Respondent replied by letter dated April 10. The response included an attachment, what appears to be an excerpt of a draft document between the Respondent and an unidentified contractor dated April 3, 2001, and entitled "Scope of Work/Specification." (GC Exh. 34, attachment "Exhibit A.") This excerpt may be in response to question 14, "Please provide copies of any guidelines that will be provided to outsourcers regarding the standards for finishing milling work." In response to paragraph 4 of the information request, set forth above, the letter indicates, "attached are detailed accounting reports that were prepared as part of the feasibility study." The "detailed accounting reports" are summaries.

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5 During an April 16, meeting the Union replied, verbally and by letter, to the Respondent's April 10 response. The Union reiterated its request for the transformation plan, feasibility study, information related to claims of competitiveness, information regarding technology, and costs related to shape work performed in-house and subcontracted. The Union also specifically requested copies of all current subcontracts for milling and finishing work [R. Exh. 15, p. 2, item 5(a)]. In item 4(e) of its April 16 letter, the Union requests an explanation of how the operating labor and benefits figure was determined, and 1-year payroll records for class 2 operators; class 9 mill operators; quality employees; and inspectors [R. Exh. 15, p.2, item 4, second par. (a), (b), 10 (e), and (g)]. During this meeting the Respondent gave the Union a 1997 service agreement between it and "JACO," a subcontractor. On April 20, the Respondent provided the Union with a written confirmation, dated April 18 of the responses provided to the Union on April 16 and 17 (R. Exh. 48).

15 On April 23, the Union gave the Respondent another information request, replying in part to the Respondent's April 18 response. This request continued to seek payroll records for class 2 operators, class 9 mill operators, quality employees, and inspectors. It also reiterated its request for an explanation of how the Respondent arrived at the operating labor and benefits figure used in its feasibility study. In addition to a few new requests, the Union stated that the Respondent had not furnished information related to the transformation plan, restructuring of the 20 business, and documentation concerning its assertion that it needed to improve competitiveness, that had been requested on April 15.

25 At the April 24 executive board meeting, which was attended by Doc Adams, the Union continued to ask why the 40-percent figure was used to calculate the cost of benefits in the feasibility study. The Union also continued to press for the actual payroll figures for the employees performing the milling and finishing work, rather than employee names and yearend earnings, which had been provided by the Respondent (R. Exh. 52).

30 On April 30, the Respondent, in addition to implementing its final contract offer, provided the Union with a written response to its April 23 information request (GC Exh. 42). The response states that the Union's April 23 request "does no more than rehash the previous information provided" and that the Respondent "does not know how information back to 1994 could be relevant to the union's proposals." The letter states that the Respondent has provided 35 all of the information in detail that was used to formulate its "restructuring" proposal. That it has made experts available to explain the financial data, arranged for informational meetings, and provided the Union with an opportunity to question Adams about the transformational plan, even though the bargaining team had already responded to the Union's questions. Brauer also testified that the sentence stating that the Respondent "does not know how information back to 40 1994 could be relevant to the union's proposals" was a response indicating a lack of relevance to section 5(g) of the Union's April 23 information request asking for "JACO Custom Grinding" compensation for 1997 through 1999 (Tr. 1521; R. Exh.17).

45 Casinelli sent a letter to the Union, on October 26, 2001, stating that the National Labor Relations Board had contacted the Respondent concerning pending charges about the subcontracting and contract bargaining. Casinelli stated that although information requested in items 4(e), (k), 5(b), (d), (e), (g), and (h), of the Union's April 23, 2001 information request, either had been provided to the Union, or was not relevant, the Respondent would provide the information, to the extent available, on November 3, 2001 (R. Exh. 18).

50 The Respondent's letter of November 2 provided the following (R. Exh. 19):

4(e): Individual benefit costs per hour are not tracked. The Respondent reiterated that benefits were calculated at 40-percent.

5 4(k): The feasibility study used an average of \$104,000 for the 4 supervisors and 2 area supervisors in the Shape Area, for a total of \$624,000. The actual costs for these 6 supervisors based on their income statements, plus the 40 percent benefit add-on was \$655,511.28.

10 5(b): The Respondent stated that “during periodic Shape review meetings, we previously have advised the executive Committee which bowl types were sent to RAVE (a subcontractor) for finishing. Further, as you are aware, we schedule finishing location by type regardless of color.” The Respondent contended that it did not have finishing data broken down by type prior to 2000, but provided a spreadsheet showing the requested information from January 2000 through June 2001.

15 5(d): The Respondent said that the information was only available back to March 2000. A spreadsheet showing the requested information from March 2000 through June 2001 was provided.

20 5(e): The Respondent noted that it had provided a copy of the 1997 subcontracts with RAVE for finishing and with TFI for milling and finishing. The Respondent said it would provide the balance of the documents available at the completion of a search.

25 5(g): The Respondent submits that subcontractor “JACO” grinds scrap Corian and does no milling and finishing work.

5(h): The Respondent states that the cost of subcontracting, based on the proposals obtained from RAVE and TFI, was set forth in the feasibility study provided to the Union on April 10. Attached were copies of the quotes from RAVE and TFI.

30 On November 13, 2001, the Union submitted the following response (R. Exh. 14): 4(e), the Union continued to request the supporting data upon which the 40-percent benefit cost figure was based. The Union explained that the Respondent had claimed that it was a self-insurer for life insurance and pension benefits, and the Union found that statement inconsistent with a 40-percent benefit cost add-on; 5(b), the Union denied receiving the requested  
35 information at shape review meetings, and it questioned the accuracy of contention that the Respondent did not have finishing data broken down by type before 2000; 5(d), the Union stated its belief that the Respondent had the requested information dating back before March 2000; 5(e), the Union stated that the Respondent had provided altered documents and an incomplete response; 5(g), the Union pointed out, contrary to the Respondent’s previous answer  
40 to this question, that “Exhibit B,” to the 1997 contract made reference to finishing work that was to be done by JACO; and 5(h); the Union stated that the request was for complete documents but that only quotes were provided. The Union also noted that the Respondent had abandoned its confidentiality claim as it pertained to this item.

45 *b. Discussion*

50 Counsel for the General Counsel contends that the April 23, 2001 information request, which is also paragraph VIII(d) of the complaint, and attached thereto as exhibit D, was critical to the Union because of the overriding importance of the subcontracting issue to the unit employees. It was imperative that the Union obtain the requested information in order to analyze and verify the accuracy of the feasibility study and the alleged savings, determine the effect of the subcontracting on the unit as a whole and its impact on the overall contact

bargaining, and develop a comparable counterproposal.

(1) Section 4(e) of the April 23, 2001 information request

5           The summary of the feasibility study generally documents labor and benefit costs (R. Exh. 41). The Union's April 23 request was for the "actual hard costs," the supporting numbers, that were the basis for the summary. For example, during the subcontracting discussions the Respondent told the Union that a benefit rate of 40-percent was used for computations in the feasibility study. Casinelli testified that the 40-percent figure included vacation, disability, and, 10 pension benefits, health care, and life insurance. The Union wanted to know what the estimated cost of each benefit. Casinelli further testified that it was possible to determine the dollar amount of pension benefits paid each year, as well as, the dollar amount of the medical bills paid on behalf of the individuals at the facility. In the same context, Casinelli stated that the benefit rate came from the corporate headquarters and was adjusted annually. Presumably, the 15 rate is based on some calculation, yet the Respondent never attempted to provide the calculation, nor is there evidence that it attempted to obtain the requested information from its headquarters, the place of origin. In this instance, the failure to provide the underlying substantiation for the percentage was especially disturbing to the Union. The Union expressly told the Respondent that it doubted the accuracy of the 40-percent figure because the 20 Respondent had previously said that it self-insured the life insurance and pensions funds.

          The Union also informed the Respondent that it had evidence that the Respondent was paying less for power than the subcontractor and, thus, the Union was of the belief that the Respondent should have been able to perform the finishing work at a lower cost. Additionally, 25 the Union thought that the feasibility study was incorrect because it used the same wage rate for the class 9 and class 10 employees.

(2) Section 4(k) of the April 23, 2001 information request

30           Instead of providing the actual supervisory labor costs in the first instance, as requested, the Respondent provided a "bundled cost for management." Thus, the summary contained in the feasibility study made it appear that an area supervisor and a low-level supervisor received salaries of \$104,400 (R. Exh. 41). Although Brauer stated that she and Casinelli were concerned about providing individual salary information, it does not appear from the record that 35 any claim of confidentiality was made to the Union, and certainly none was made in the Respondent's written responses (R. Exhs. 42, 19).

(3) Section 5(b) of the April 23, 2001 information request

40           The Union was interested in the style, number and color of the finished bowls because of potential discrepancies between the comparative costs for subcontracting and onsite finishing, depending on the color and type of bowl being finished. Employee witnesses credibly testified that some bowl types require more time to finish than others. Obviously, the greater the amount of time required, the greater the cost. Nor was the Union privy to the bowl types that were being 45 finished in-house under the 1995 CCMC finishers agreement for the time period before May 1, 2001. The Union was also aware that some employee finishers thought that the Respondent was retaining the more difficult finishing jobs in-house. The net effect of the above would be to skew the feasibility study to make it appear that the cost was greater to finish the bowls in-house. 50

(4) Section 5(d) of the April 23, 2001 information request

On April 16, the Respondent provided the Union with a service agreement between the Respondent and JACO. This agreement contained a loss-damage allowance provision. This provision made JACO liable for all loss, damage, or destruction that exceeded the allowance (R. Exh. 56, par. 16). The Union, aware that it was dissatisfaction with the quality that had caused the Respondent to return the finishing work to the facility, wanted to know the actual rate of damage. The Union wanted to compare the onsite to the offsite damage rates during a comparable time period. The Union was of the opinion that 1994 or 1995, when a substantial amount of finishing was being done offsite, would provide a comparable time period. If the damage rate was higher offsite than on, that would lower the cost of onsite finishing. Casinelli admitted that the Respondent did not provide the Union with the requested information during the April–May time frame, and Guralny credibly testified that the Union could not have obtained the damage rates elsewhere.

(5) Section 5(e) of the April 23, 2001 information request

The Union wanted the subcontracts for the milling and finishing work from 1994 to the present in order to track the cost increases over a period of time. Briggs testified that it was the Union's hope to combine future subcontracting cost increases, with the length of time it would take to fully develop the technology and that the subsequent diminution of the \$1 million dollar savings might be sufficient to convince the Respondent not to subcontract the work (Tr. 840). The Union received some, but not all, of the subcontracts.

The record also supports counsel for the General Counsel's contention that not all the documents given to the Union were complete. Brauer, testified that she gave the Union a copy of a contract with Essential Products (which became TFI) on April 27 (Tr. 1428; R. Exh. 57). This document was apparently provided to the Union a second time, as part of the November 2 response. Counsel for the General Counsel contends that Respondent's Exhibit 57 is only a portion of a procurement agreement. He contends, correctly, that General Counsel's Exhibit 65, which was obtained pursuant to a subpoena, is the complete agreement. Casinelli also admitted that the Respondent failed to provide the Union with a master services agreement dated March 1, 2001, between the Respondent and Rave, that applied to milling and finishing work, as well as, an April 19 contract order for finishing work based on the master services agreement (GC Exhs. 66, 67).

(6) Section 5(g) of the April 23, 2001 information request

The du Pont/Jaco service agreement (R. Exh. 56) contains exhibit B, Compensation. Exhibit B includes information about Jaco Custom Grinding Corp. and Rave, Inc. The Union's requests for the same information spanning a 3-year period was predicated on attempting to determine the long-term cost of subcontracting. The Respondent never provided the information claiming that it was irrelevant because Jaco did not perform milling and finishing work (R. Exh. 19) At the hearing, Casinelli and Brauer testified that the agreement does relate to milling and finishing work (Tr. 1522, 1762).

(7) Section 5(h) of the April 23, 2001 information request

During subcontracting negotiations, Brauer said that the feasibility study was based, in part, on a vendor quote (Tr. 1354). She testified that she understood that the Union wanted the actual quote, and not simply the numbers contained in the feasibility study (Tr. 1523). Casinelli testified that the feasibility study contained a single number representing the cost of outsourcing. He admitted that he did not know the number of vendors submitting quotes, or the calculation used to arrive at the number representing the cost of the outsourcing (Tr. 1755–

1756). Briggs credibly testified that the quote would help the Union in evaluating the validity of the feasibility study's alleged savings. He also testified that the Union had offered to sign a confidentiality statement to protect any property or proprietary concerns that the Respondent might have in releasing the vendor quote.

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#### (8) The Respondent's arguments

The Respondent does not deny that it never provided the Union with the calculations upon which the 40-percent rollup benefit cost was based, as requested in item 4(e). It contends, rather, that the Union could have used its own computations for the purpose of formulating a bargaining proposal. In essence, the Respondent also admits that it failed to provide the Union with the actual labor cost for supervision, item 4(k), in a timely fashion. It argues that when the actual costs were supplied, they showed only that the Respondent underestimated its projections by \$30,000. A relatively minor amount that could not have caused the impasse.

Regarding the actual quotes from the vendors requested in item 5(h), the Respondent maintains, without explanation, that the figure in the feasibility study is sufficient. It also contends that the Union was provided with the relevant sections of the underlying subcontracts that were requested in item 5(e). Finally, regarding items 5(b), (d), and (g), the Respondent contends that requested information is irrelevant to the impasse because those items did not deal with milling and finishing. Item 5(b) had no impact because the Union had done its own investigation and knew which bowls were being subcontracted, and in any case the Respondent intended to subcontract the milling and finishing work on all the bowls. The damage rates sought in item 5(d) were immaterial, because the vendor contract provided to the Union limited the Respondent's exposure to the cost of damaged product to a maximum of 3-percent, so the Union could have easily tested the Respondent's financial projections by using that factor. Regarding item 5(g), the Respondent again questions its relevance by asserting that the cost of the grinding work performed by Jaco had nothing to do with the feasibility study conclusion regarding the on savings to be achieved from subcontracting the milling and finishing work.

#### *c. Analysis and conclusion*

It is well settled that an employer, on request, must provide a union with information that is relevant to carrying out its statutory duties and responsibilities in representing employees. This duty to provide information includes information relevant to negotiations. Where the information sought pertains to employees in the unit, the information is deemed presumptively relevant and must be disclosed. Where the information concerns matters outside the bargaining unit the burden is on the union to demonstrate relevance. E.g., *Schrock Cabinet Co.*, 339 NLRB No. 29 (2003). The burden is satisfied when the union demonstrates a reasonable belief supported by objective evidence for requesting the information. The Board uses a broad, discovery-type standard in determining relevance in information requests. Potential or probable relevance is sufficient to give rise to an employer's obligation to provide information. E.g., *LBT, Inc.*, 339 NLRB No. 72, slip op. at 2 (2003); *CEC, Inc.*, 337 NLRB 516, 518 (2002), and cited cases. The burden to show relevance is "not exceptionally heavy." *Leland Stanford Junior University*, 262 NLRB 136,139 (1982), enfd. 715 F 2d. 473 (9th Cir. 1983).

An employer, absent a valid defense, must respond to the information request in a timely manner. An unreasonable delay in furnishing the information is as much a violation of the Act as is a refusal to furnish the information. E.g., *American Signature, Inc.*, 334 NLRB 880, 885 (2001). "With respect to any information that has now been provided to the Union, the remedy would be limited to a cease-and-desist order." E.g., *Made 4 Film, Inc.*, 337 NLRB 1152, 1159

(2002), citing *Postal Service*, 332 NLRB 635 fn. 2 (2000).

5 The relevancy of the requested information was established on April 2, 2001, when Plant Manager Doc Adams announced the corporate transformation plan, the stated objective of which was to improve competitiveness. Plant Manager Adams stated specifically that the focus was on the need to improve the competitiveness of the shape business. To this end he announced that there was an ongoing feasibility study to determine if subcontracting the milling and finishing work would provide a business advantage. He stated that he expected the elimination of some of the existing positions at the facility (GC Exh. 28). Immediately thereafter, 10 the Respondent announced that based on its feasibility study, it could save \$1 million by subcontracting the milling and finishing work. The Respondent then challenged the Union to develop a comparable proposal.

15 The Union would not be properly representing its members, and thereby not fulfilling its statutory responsibility, if it were to accept the Respondent's claim without being provided access to the substantiating documentation. Moreover, the Union is entitled to the baseline information in order to formulate its own proposals. Unverified summaries, produced by the Respondent's officials, are not sufficient for either purpose. E.g., *Ormet Aluminum Mill Products Corp.*, 335 NLRB 788, 802 (2001), and cases cited therein; *Taylor Hospital*, 317 NLRB 991, 994 20 (1995).

25 Item 4(e) of the information request relates to the benefit costs of unit employees and as such is presumptively relevant. Counsel for the General Counsel has demonstrated that the remaining six items are necessary and relevant in order for the Union to either assess, or understand, the feasibility study, or formulate its own proposals. Accordingly, I conclude that the Union had a reasonable and objective factual basis for its information request of April 23 which is the subject of paragraph VIII(d) of the complaint, and attached thereto as exhibit D.

30 The Respondent specifically asserts that the information requested in item 5(b) is unnecessary because the Union has done its own "independent investigation," I find that the record does not support that assertion.

35 Item 5(b) is a requests the total number of bowls listed by style, number, and color finished since 1997 and the location were they were finished. The Union needed this information because of the potential discrepancies between the comparative costs for subcontracting and onsite finishing, depending on the color and type of bowl being finished. Employees witnesses credibly testified that different bowl types take longer to finish. Obviously, the greater the amount of time required, the greater the cost. Nor was the Union privy to the types of bowls that were being finished in-house under the 1995 CCMC finishers agreement for 40 the time period before May 1, 2001. It also asserts that the information is irrelevant because it was the Respondent's intention to subcontract the milling and finishing work of all the bowls.

45 The Respondent's argument that this information was irrelevant because it was the Respondent's intention to subcontract all the bowls, regardless of style or color is off the mark. The Respondent claimed that by subcontracting the milling and finishing work it would save \$1 million. The Union needed to test the validity of that contention. One method was to compare the costs of finishing the bowls under the previous subcontracts. The Union was told by the finishers, the employees who performed the work, that they believed that the Respondent was keeping the bowls that were more difficult to finish in-house. This belief was consistent with the 50 Respondent's stated reason for returning the finishing work to the facility—poor quality control by the subcontractors. Because the finishing of the bowls is labor intensive, the longer it takes to finish a bowl, the greater the labor cost. Thus, in order for the comparison to be valid it was

necessary to ensure that the style and color of the bowls being compared were similar.

5 Union President Guralny testified that he obtained the information about the Respondent retaining the more difficult finishing jobs by after talking with the finishers. In response to a question on cross-examination asking if the Union had conducted an “independent investigation” in order to try and obtain the requested information, he replied, “[Y]es”. He then explained that the investigation consisted of him talking with the finishers. (Tr. 659–660.) It is evident that Guralny’s discussions with some finishers formed part of the basis for the request, but his limited discussion with the finishers was not sufficient to satisfy the relevant information that was needed and requested.

10 Regarding the damage rates requested in item 5(d), the Respondent in brief opines that the rates are immaterial since the vendor contract limited the Respondent’s exposure to the cost of damage to 3-percent. Assuming, for the sake of argument that this proposition has merit, I find no evidence that it was ever conveyed to the Union. Casinelli who, along with Brauer, was ultimately responsible for answering the information requests, testified only that he did not see the relevance to extending back 5 years. Although the Union explained that it needed to compare the onsite to the offsite damage rates during a comparable time period. It was of the belief that 1994 or 1995, when a substantial amount of finishing was being done offsite, would provide a comparable time period. Casinelli never offered his opinion as to what would be a comparable time period, nor did he explain his disagreement with the Union’s time frame. Upon receiving the request, Casinelli testified that he did not even ask anyone the length of time for which the Respondent retained damage rates.

25 It was only later, in preparing the Respondent’s November 2 response, that Casinelli reviewed the damage rates for approximately a 12-month period. Whatever information he may have provided at that time was of no use to the Union. The November 2 response can easily be characterized as “too little, too late.” The time for good-faith bargaining had long passed, the work was subcontracted, the employees laid off, and the General Counsel was contemplating issuing a complaint. Even at that late date the Respondent still did not fully satisfy the information request. It was only in response to a subpoena that the complete subcontracting contracts were provided.

30 In this regard, the Respondent contends that, at least so far as the TFI contract is concerned (R. Exh. 57), the sections that were not provided were only “boilerplate contract clauses” and that the document that was provided was all that was in the contractor files at the facility. Casinelli testified that in obtaining the TFI contract to provide to the Union either he (Tr. 1827) or someone else (Tr. 1752) received the three-page document entitled “procurement agreement” (R. Exh. 57) from the facility’s contract administrator. He further testified that he never asked the contract administrator if there were any other contracts that would be responsive to the Union’s request. In his opinion, he gave them what he thought the Union was asking for (Tr. 1828–829), and all that it needed (Tr. 1864).

45 The Respondent admits that the requested documents are relevant (R. Br. 78). Once that fact is established it is the Respondent’s duty to supply the documents as requested, in this case all the current subcontracts, or an explanation why the complete documents cannot be supplied. The Respondent’s duty is not satisfied by supplying only those parts of relevant documents that it deems necessary. See *Good Life Beverage Co.*, 312 NLRB 1060, 1070 (1993).

50 It is not enough that the Respondent may have provided the Union with reams of information throughout the course of negotiations. The relevant information requested by the

Union was essential for it to engage in meaningful bargaining. The request pertained to the precise issue over which the parties were bargaining, the business advantage of subcontracting the milling and finishing work. The Union made the Respondent well aware of the critical importance of this issue. The decision to subcontract the milling and finishing work had the potential to cause the largest layoff of unit employees in over 17 years. Consistent with the Union's expressed concern over the importance of the issue the Union began requesting relevant information immediately following the announcement of the Respondent's transformation plan.

Accordingly, I conclude that the Respondent violated Section 8 (a)(1) and (5) by failing and refusing to furnish the information requested by the Union in its April 23, 2001 letter.

## 2. Alleged failure to allow sufficient time to review necessary information

A corollary to the duty to furnish relevant information, is that before a valid impasse is declared the recipient must have had adequate time to review and consider the information. *Royal Motor Sales*, 329 NLRB 760, 763 fn. 14 (1999). Counsel for the General Counsel contends that the Union did not have sufficient time to review, analyze and consider a considerable amount of information provided shortly before it declared impasse.

The Union was given the summary of the Respondent's feasibility study on April 10, 2001. The Union made a further information request on April 16. This request asked for payroll records for class 2 operators, class 9 mill operators, quality employees, and inspectors (R. Exh. 15, p. 2, item 4, par. 2 entitled "detailed accounting reports" for "Labor"). The Union intended to use this relevant and necessary information to ascertain the accuracy of the feasibility study, and to use it in formulating a counterproposal. The Respondent provided the information, which consisted of thousands of sheets of paper, on April 27, only a few days before its May 1 implementation of its subcontracting decision. "The delivery of the requested information was followed essentially without delay by the implementation of the final offer[]". Thus, it is impossible to determine if the information would in fact have been used by the Union to modify its position. This uncertainty must be resolved against [the] Respondent[] whose precipitous action[] created [the] uncertainty." *Dependable Maintenance Co.*, 274 NLRB 216, 219 (1985).

Both the Respondent's failure to provide relevant information and declaring impasse and implementing its changes "before the Union has a reasonable opportunity to review the relevant information provided to it . . . and to analyze the impact such information would have on any counteroffers it might make" are the same facts that were present in *Decker Coal*, 301 NLRB 729, 740 (1991), quoting *Storer Communications*, 294 NLRB 1056 (1989). In *Decker Coal*, Administrative Law Judge Pannier concluded:

In sum, it cannot be said with any degree of certainty that negotiations would not have continued and would not have progressed to final agreement once the Union had been furnished with the requested information and allowed sufficient time to evaluate it. In the circumstances, a contrary conclusion would be speculative. Respondent has shown no compelling need to have made a last and final offer, and then to implement its terms, before the Union had been afforded those statutory rights. *Id.* at 744.

The Board has recently cited *Decker Coal* as an example of a case, as here, where the unfilled information request precludes a finding of impasse, as distinguished from cases unlike *Decker Coal*, where the unfilled information request has no relevance to the core issues separating the parties. Compare, *Decker Coal* with *Sierra Bullets, LLC.*, 340 NLRB No. 32 (2003).

3. Forcing the Union to engage in effects bargaining before completion of decision bargaining

5 This allegation, in addition, to being part of Counsel for the General Counsel's alternate theory of the case, is also alleged in paragraphs IX(f) and (k) and XI, as an independent violation of the Act.

*a. Facts*

10 On April 2, 2001, the Respondent announced that it was reducing its global workforce and closing less competitive manufacturing assets (GC Exh. 29). This announcement was apparently part of the transformation program Plant Manager Adams mentioned in his memo of the same day (GC Exh. 28). Adams testified that participation in the transformation plan was  
15 voluntary, that he knew about the plan a month before the announcement, and that he had begun "positioning" the facility in order to participate in the plan. As a result of the transformation plan the Respondent expected to take a one-time second quarter charge of about 4045 cents per share. It anticipated that about half of the charge would be for employee  
20 severance costs. The impact of this announcement on the local level was that any severance costs resulting from terminating employees, because of subcontracting the milling and finishing work, would be assumed at the corporate level as part of the overall global restructuring. The severance costs would only be assumed if the terminated employees were participating in the corporatwide career transition program (CTP). The unit employees had a separate severance  
25 plan, and the union membership had rejected the Respondent's final offer, in 1999, that contained the CTP.

30 Brauer proposed the corporatwide CTP to the Union during the same meeting, and on the same day, April 5, that she announced the Respondent's intention to layoff all class 2 finishers and the milling operators by June 29, 2001. Brauer believed that the CTP was more generous than the current unit severance plan. She told the Union that the CTP agreement had to be signed by April 26. Adams and Casinelli testified that the April 26 date was chosen to allow the facility to complete the administrative work necessary to comply with the May 1  
35 deadline contained in the corporate transformation plan. Adams testified that the use of the CTP plan would have saved the facility \$200,000.

40 Briggs testified that the Union's priority was always to save jobs by convincing the Respondent not to subcontract the milling and finishing work. With that as a goal, it had hoped that there would be no decision and hence no need to bargain over effects. Briggs testified about the difficulty of addressing the CTP issue, as well as obtaining information necessary to verify the feasibility study and formulate its own bargaining proposal, all by a May 1 deadline.

45 The membership had previously rejected a final offer that contained the CTP. The Union had reservations about the CTP because the Respondent retained a significant amount of discretion regarding the circumstances under which the benefits contained in the plan would be applicable. Brauer confirmed that the Respondent retained a certain amount of discretion under the CTP. Notwithstanding the Union's reservations concerning the CTP, it believed that the plan would benefit those employees laid off as a result of the subcontracting. Apparently this  
50 belief was because the Respondent was guaranteeing that the benefits would apply under the current circumstances. On April 6, the Union proposed a one-time only application of the CTP to those unit employees laid off as a result of the subcontracting of the milling and finishing work (Tr. 529-531).

On April 11, the proposal was rejected by the Respondent. The Respondent insisted that the CTP must apply to all unit employees. The Respondent, once again, told the Union that its proposal had to be accepted by April 26. No further discussions regarding CTP were held, and on May 1 the Respondent declared impasse, and began subcontracting the milling work.

*b. Analysis and conclusion*

It is undisputed that the subcontracting decision at issue, is a mandatory subject of “decision” bargaining. It is also well settled that severance pay is a mandatory subject of “effects” bargaining, and that the Respondent has a “duty to bargain ‘in a meaningful manner at a meaningful time’ with the Union that represents its employees over the effects of the [decision].” *Stevens International, Inc.*, 337 NLRB 143, 150 (2001), quoting *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 682 (1981).

Counsel for the General Counsel submits that it is well established that in cases of plant closings a union’s obligation to request effects bargaining, and, thus, avoid waiver of that right, is triggered only by a clear announcement that a firm decision has been made which affects the employees’ terms and conditions of employment; an “inchoate and imprecise announcement of future plans,” which stresses that no decision has yet been made is insufficient to trigger the obligation. *Sierra International Trucks, Inc.*, 319 NLRB 948, 950 (1995), quoting *Oklahoma Fixture Co.*, 314 NLRB 958, 960–961 (1994). From this principle counsel for the General Counsel derives that because effects bargaining is triggered by the finality of the decision, it is not meaningful to discuss effects bargaining before decision bargaining has been completed, or a good faith impasse has been reached. As evidence that bargaining on effects should occur after the decision bargaining has been completed counsel for the General Counsel cites *Dan Dee West Virginia Corp.*, 534 (1970), where the Board adopted an administrative law judge’s finding that bargaining over effects “was premature until the matter of the change (the decision to change to a distributorship) was resolved or an impasse reached on it.” 180 NLRB at 539.

The Respondent argues that the April 26 deadline was not artificial, but was based on legitimate business justifications associated with the corporate transformation plan. The Respondent also contends that 3 weeks was sufficient time for the Union to choose between the benefit plans, both of which were well known to the Union.

Counsel to the General Counsel’s argument has an appealing logical progression to it. It also requires, in effect, that a per se violation be found whenever an employer offers a proposal concerning the effects of a decision before completion of bargaining over the decision, and that I am unwilling to do. Nor am I persuaded that *Dan Dee West Virginia Corp.* requires such a result. The quote provides some support for counsel for the General Counsel’s position. I do not, however, find it dispositive of the issue, nor does counsel for the General Counsel contend that it is so. The case has never been cited for the quoted proposition, in fact, my research does not show that the case has ever been cited. The issue concerns the employer’s failure to bargain over the decision. The complete sentence seems to be an attempt to justify the union’s avoidance of effects bargaining. The sentence states, “It may be true that the Union avoided bargaining about the effects of the change, but bargaining on that subject was premature until the matter of the change was resolved or an *impasse* (emphasis in the original) reached on it. Accordingly, I find *Dan Dee West Virginia* distinguishable, or at least, sui generis, and I conclude that the Respondent did not violate the Act when it made an offer concerning the effects of the decision to subcontract the milling and finishing work, before completion of the bargaining over the decision to subcontract.

I also find that, under the circumstances of this case, bargaining over the issue of the two severance plans for 3 weeks is not evidence of bad-faith bargaining over the effects. The parties did bargain. The Respondent made a proposal, the Union presented a counterproposal, the counterproposal was rejected, but the Respondent continued to offer its original proposal. Accordingly, I do not find that the Respondent violated the Act when it made an offer concerning the effects of the decision to subcontract the milling and finishing work, before completion of the bargaining over the decision to subcontract and when it set a deadline for conclusion of bargaining over a severance plan for those employees who would be displaced as a result of the subcontracting of milling and finishing work on Corian bowls.

Counsel for the General Counsel also argues that by “informing the Union that it could not bargain over an effects issue, it effectively deprived the Union of an opportunity to bargain in good faith over effects in violation of Section 8(a)(1) and (5) of the Act.” The complaint alleges that the Respondent failed to bargain in good faith over the effects from April to July 2001. I have found that the Respondent’s proposal concerning the CTP, set forth above, is not evidence of bad-faith bargaining. The parties stipulated that the Union and the Respondent met for 15 sessions between May 3 through July 24 and that those sessions dealt primarily with effects bargaining. There is no other evidence concerning bargaining over the effects. Accordingly, I recommend dismissing those allegations in the complaint that allege bad-faith bargaining over the effects of the decision to subcontract, specifically paragraphs IX(f), (j), (k), and (q), and XI.

#### 4. Conclusion

I agree with counsel for the General Counsel’s alternative theory for the reasons set forth above. I find there was no good faith impasse on May 1, when the Respondent announced impasse, and began subcontracting the milling and finishing work. At the time of its announced impasse and implementation, the Respondent had failed to provide relevant information to the Union, and failed to allow the Union sufficient time to review necessary information. Accordingly, I find that the Respondent violated Section 8(a)(1) and (5) of the Act when, on May 1, 2001, it commenced subcontracting milling work, and on July 1, 2001, commenced subcontracting finishing work, on Corian bowls, to JACO and TFI.

#### *C. Additional Information Request Allegations*

Paragraphs VIII(a) and (f), and XI of the complaint allege that the Respondent unlawfully delayed providing a response to the Union regarding a September 28, 2000 information request until March 12, 2001. The information request is attached to the complaint as exhibit A. Paragraphs VIII(b) and (g), and XI allege that on January 19, 2001, the Respondent failed to provide information to the Union pertaining to employee gifts and incentives. The information request is attached to the complaint as exhibit B. Paragraphs VIII(c) and (h), and XI allege that on January 19, 2001, the Respondent failed to provide information to the Union regarding a disciplinary investigation. The information request is attached to the complaint as exhibit C. All the foregoing sections of the complaint allege violations of Section 8(a)(1) and (5) of the Act.

#### 1. The September 28 request

##### *a. Facts*

On September 28, 2000, the Respondent informed the Union that the milling operators would be assigned a 15-shift schedule, as opposed to the 20-shift schedule. The Respondent told the Union that the fourth shift of milling operators would be incorporated into the three

remaining shifts. The anticipate result, based on a time study, would be enhanced efficiency, especially during lunch and break periods. It would also result in the loss of Saturday and Sunday work.

5           Also on September 28, Union President Guralny gave Area Employee Relations  
 Superintendent Debbie Brauer the information request at issue (complaint exhibit A; GC Exh.  
 16). The request sought, among other items, the total number of “as cast” bowls for 3 years,  
 staffing levels of class 2 finishers for 5 years, sanding stations per shift, bowls being cast,  
 10 milled, and sanded per week, as well as, whether Essential Products or TFI subcontractors,  
 were finishing and milling bowls. The request was based on the Union’s concern that the  
 Respondent was subcontracting work, at time when the facility was not operating at full  
 capacity. The Respondent had explained that there was a bottleneck occurring in the milling  
 operation. Because the bowls could only be finished after being milled the bottleneck in milling  
 was impacting the amount of bowls that could be finished. The Respondent claimed that its  
 15 mills were working at full capacity, but that subcontracting was also necessary.

          About 3 weeks after the request Guralny asked Brauer its status. Brauer indicated that  
 Dennis Wertz, who is involved with the CCMC production process, was handling the request.  
 Wertz was unavailable that day, but a few days later he told Guralny that because of the lengthy  
 20 time period requested there was “a lot to pull together,” but that he would respond once he “had  
 it together.” Twice more Guralny asked Wertz about the request and both times he said he was  
 still “pulling it together.” In November 2000, the Respondent began the 15-shift schedule (Tr.  
 709).

25           In response to the announcement that the Respondent was canceling the CCMC finisher  
 agreement, set forth above, the Union, on March 6, 2001, submitted a new information request.  
 This request incorporated the September 28, 2000 request, and reminded the Respondent that  
 the September 28 request “has still not been answered” (GC Exh. 22). Brauer testified that she  
 did not recall why the September request was not answered but thought that “it might have  
 30 slipped through the cracks.” Guralny testified that the information sought in September was still  
 relevant in March because the Respondent was seeking to implement new technologies that  
 had the potential to eliminate the milling and finishing work. The Union was trying to reconcile  
 the reduction in milling hours with the subcontracting of the milling work. In that regard the  
 information requested in September could provide a standard for measuring milling operations.  
 35 Brauer knew of this concern.

          The information requested in September 2000 was not furnished to the Union until  
 March 12, 2001, almost 6 months after the initial request. The Respondent never asked if the  
 40 Union had lost interest in the information, nor did it question the Union’s need for the  
 information.

#### *b. Analysis and discussion*

45           Counsel for the General Counsel submits that those sections of the September 28,  
 2000, request dealing with bargaining unit work are presumptively relevant and the Union has  
 demonstrated the relevance of those sections pertaining to unit work being performed offsite by  
 subcontractors. E.g., *Pall Biomedical Products Corp.*, 331 NLRB 1674, 1678 (2000), and cited  
 cases. I agree, and the Respondent does not argue otherwise.

50           The Respondent does contend that after the shift change was implemented in November  
 2000, the request became moot. The Respondent also contends that both Brauer and Area  
 Human Resources Superintendent Anthony Casinelli were busy with contract negotiations and

other information requests and as such the delay in responding to the September request was at most a minor inconvenience to the Union.

5 I disagree that the union request became moot in November when the Respondent implemented the shift change. The right of a union to requested information is determined by the situation that existed at the time of the request. E.g., *Booth Newspapers, Inc.*, 331 NLRB 296, 300 (2000). Guralny testified that the request for information was based in part on the Union's concern that the mills were not operating 7 days a week and yet bowls were being sent  
10 offsite to be milled (Tr. 412-417). The information request states that the information is needed to "maintain job security" and item 3 of the request goes directly to the subcontracting issue.

Nor is the Respondent's contention that Brauer and Casinelli were very busy well founded. As the Board stated in *Allegheny Power*, 339 NLRB No. 77, Slip op. at 3 (2003):

15 In determining whether an employer has unlawfully delayed responding to an information request, the Board considers the totality of the circumstances surrounding the incident. "Indeed, it is well established that the duty to furnish requested information cannot be defined in terms of a per se rule. What is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow." *Good Life Beverage Co.*, 312 NLRB 1060, 1062 fn. 9 (1993). In evaluating the promptness of the  
20 response, "the Board will consider the complexity and extent of information sought, its availability and the difficulty in retrieving the information." *Samaritan Medical Center*, 319 NLRB 392, 398 (1995).

25 Brauer testified only that she could not recall why the information was not provided in a timely fashion. Guralny testified that it was Wertz, not Brauer, who was gathering the information, and whenever Guralny asked him about it he only said that he was "still pulling it together." Guralny's testimony that the Respondent could easily retrieve the information from its computer records was not rebutted. The Respondent never claimed that gathering the information was  
30 unduly burdensome. Indeed, the Respondent indicates in its brief that the information was assembled and provided within 6 days of the second request. I conclude that the Respondent did not make a "reasonable good faith effort to respond to the request as promptly as circumstances allow."

35 Failing to provide relevant and necessary information in a timely manner, is as much a violation of the Act as is a refusal to provide information. E.g., *Booth*, supra, at 300. Accordingly, I find that the Respondent unlawfully delayed providing a response to the Union regarding a September 28, 2000 information request until March 12, 2001, and thereby violated  
40 Section 8(a)(1) and (5) of the Act.

## 2. The January 19 request regarding gifts and incentives

### a. Facts

45 Paragraphs VIII(b) and (g), and XI of the complaint allege that on January 19, 2001, the Respondent failed to provide information to the Union pertaining to gifts awarded to class II employees and details regarding an incentive program (complaint exhibit B; GC Exh. 12). The incentive program itself is the subject of a complaint allegation that is addressed below.

50 The information request was initiated based on rumors Guralny had heard regarding product gift cards being awarded to unit employees for work performed and productivity levels achieved. He also sought to verify a claim that some employees had received offsite training to



Guralny was present for all the interviews except for that of one unit employee and Paradise. Sometime after the investigation Paradise was demoted and moved away from Sharrett. In response to the information request of January 19, 2001 (GC Exh. 44, and exhibit C of the complaint), Brauer provided the Union with a single-page document entitled “summary” (GC Exh. 45).

Guralny testified that he was present during Brauer’s interview with Sharrett and that the summary regarding that interview was not accurate. He also testified that the Union was concerned about the disparate application of the Respondent’s “People Treatment” policy. He stated that under the policy Unit employees had, after being investigated by “consultants . . . from Corporate Headquarters” been discharged or suspended. Paradise, in contrast, was apparently only the focus of a local investigation, did not receive as severe a penalty as some unit employees, and yet, had been the subject of a number of grievances concerning harassment of people in the workplace. The Union wanted to compare the information that was on the “grapevine” with that contained in the notes (Tr. 711–712).

*b. Analysis and discussion*

Counsel for the General Counsel submits that there is a conflict regarding whether the Respondent had ever provided “raw investigation” notes to the Union. Brauer testified that providing actual notes of interviews did not conform to past practice. Casinelli corroborated her testimony, but he also admitted that in the past the Union had expressed its preference for the “raw investigation” notes. Guralny in response to the question “had you received these types of document summaries prior to this occasion” answered, “[N]o”. I see no conflict. Guralny’s denial that he had received document summaries before, does not establish that either he, or the Union, had ever received the actual notes from the investigation. He may never have received either. I do agree with counsel for the General Counsel’s contention that the fact that the Union did not pursue the actual notes on previous occasions, does not constitute a “clear and unmistakable waiver” of statutory rights, e.g., *T.U. Electric*, 306 NLRB 654, 656 (1992), and the Respondent does not contend otherwise.

The Respondent does contend that the Union’s complaint was that the Respondent did not terminate Paradise, and thus the information is not presumptively relevant and that counsel for the General Counsel has not met his burden of showing that the information concerning a nonunit employee was material to the administration of the parties’ contract.

In so far as the requested information pertains to employees in the bargaining unit, it is presumptively relevant. Where the information sought concerns a person outside the bargaining unit, here a supervisor, the Union bears the burden of establishing the relevance of the requested information. *Reiss Viking*, 312 NLRB 622, 625 (1993). In either situation the Board uses a broad, discovery-type standard. The Board does not pass on the merits of the underlying grievance; the Union is not required to demonstrate that the information sought is accurate, nonhearsay, or even ultimately reliable. E.g., *Postal Service*, 337 NLRB 820 and cases cited (2002). The burden is not an exceptionally heavy one, even potential or probable relevance is sufficient to give rise to an employer’s obligation to provide information. See, e.g., *U. S. Testing Co.*, 324 NLRB 854, 859 (1997), enfd. 160 F.3d 14 (D.C. Cir. 1998), rehearing en banc denied (1999).

The Union’s purpose in requesting the actual investigation notes was to evaluate whether there was disparate treatment of supervisors and bargaining unit employees with regard to the application of the Respondent’s “People Treatment” policy. The requested information is relevant and necessary to that inquiry. E.g., *Postal Service*, 332 NLRB 635, 636

(2000).

The Supreme Court in *NLRB v. Detroit Edison Co.*, 440 U.S. 301 (1979), held that, in certain situations, confidentiality claims may justify a refusal to provide relevant information. In *Pennsylvania Power & Light Co.*, 301 NLRB 1104, 1105–1106 (1991), the Board discussed and employer’s obligation when raising a confidentiality assertion as follows: “[t]he party asserting confidentiality has the burden of proof. Legitimate and substantial confidentiality and privacy claims will be upheld, but blanket claims of confidentiality will not.” The burden of proof requires “a more specific demonstration of a confidential interest in the particular information requested.” *Washington Gas Light Co.*, 273 NLRB 116, 117 (1984). Further, a party refusing to supply information on confidentiality grounds has a duty to seek an accommodation that will meet the needs of both parties. *National Steel Corp.*, 335 NLRB 747, 748 (2001), and cases cited. Here the Respondent not only made a blanket claim of confidentiality, but never made an offer of accommodation.

Accordingly, I find that the Respondent violated Section 8(a)(1) and (5) of the Act as alleged.

*D. Denying Union Representatives Access to Investigate Potential Grievances and Threatening Union Representatives with Unlawfully Discipline*

Paragraphs VI(a) and (b) of the complaint, as amended at the hearing, allege that on September 23, 2000, Area Superintendent Rory Watson and Area Human Resources Superintendent Anthony Casinelli, unlawfully denied employees, in their capacity as union representatives, access to the facility where they sought to investigate potential grievances. Respondent, by Watson, also unlawfully threatened these employees with discipline if they failed to leave the facility.

1. Facts

The Tedlar building is located in the middle of the facility. It consists of a small office area in the front, a finishing area, a training area behind the finishing area, a loading dock, mix area, and a polymer area behind the mix area. In the mix area, the polymer is placed in bins, mixed with solvent, blended, and pumped into the casting area. Numerous unit employees work in the building. On September 23, no work was scheduled in the building but there was work being performed in the facility.

It is undisputed that on the morning of September 23 Al Moore, local union financial secretary, Jeff Houseman, local union recoding secretary, and Gary Guralny, local union president, entered the Tedlar building through the finishing area. Their visit was prompted by an “Employee Information Bulletin” stating that management was going train supervisors and other nonunit personnel to operate equipment usually operated by unit personnel, because of a strike authorization vote that was held in August. The bulletin claimed that the training was only for the purpose of strike planning. Guralny had also heard from Casinelli that no product would be produced. The union officials believed that it might be a contract violation if management operated the Tedlar casting line, which was unit work (GC Exh. 2, art. XII, sec. 3, p. 36). The Union wanted to get the facts of the matter and to verify the claim that product was not being produced.

Upon entering the building the union officials were stopped by Watson. Moore told him that they were investigating a possible grievance and/or NLRB charge. Watson replied that there was no need for them to be in the building because the Respondent had told the Union

what was it was doing, and he asked them to leave. Moore replied that they felt that they needed to see what the Respondent was doing in order to file a grievance. Watson said that if they did not leave they could be disciplined, up to and including, discharge. Houseman left, and Guralny told Watson that they were remaining. Watson said that he wanted them to understand that they might be disciplined if the did not leave, he then returned to his office. The men remained for a time and observed individuals being trained to use an overhead hoist. They eventually walked along the outside of the building. They could see very little because the doors were closed and the doors only had little "porthole" windows. They did notice an absence of steam emanating from a polymer vent, indicating that there could have been something happening in the production process. They walked as far as the maintenance shop because of their concern over a safety issue involving a large propane tank. As Guralny and Moore were returning to the union office, which is located at the facility, they met Casinelli. He also told them to leave and that the Respondent did not want them walking around the Tedlar area.

Guralny and Moore credibly testified that they had never been denied access, nor needed permission, to visit any area of the plant while investigating grievances at anytime.

## 2. Analysis and discussion

The parties agree that the balancing test for determining whether an employer can lawfully deny a union's request for access for informational purposes set out in *Holyoke Water Power Co.*, 273 NLRB 1369 (1985), enfd. 778 F.2d 49 (1st Cir.) is controlling precedent for this issue. *New Surfside Nursing Home*, 322 NLRB 531 fn. 2 (1996). That test requires accommodating two conflicting rights; the right of employees to be responsibly represented by a union, and the right of the employer to control its property and ensure that its operations are not interfered with. Thus, where it is shown that a union can effectively represent employees through some alternate means other than by entering on the employer's premises, the employer's property rights will predominate, and the union may properly be denied access. *Holyoke*, supra at 1370. It is the employer's burden to establish "those factors which would support a conclusion that its property right is paramount to the union's right of reasonable access." *New Surfside Nursing Home*, 322 NLRB at 535, citing *Hercules Inc.*, 281 NLRB 961 (1986).

In addition to the safety issue, the Union sought access to gather information for a potential grievance, i.e., to ascertain if non-unit individuals were performing unit work and producing a saleable product. Although not dispositive of the issue, the information that the Union sought to obtain by observing the process is presumptively relevant to, and necessary for, its role as the employees' collective-bargaining representative. *Holyoke*, supra at 1370.

The Respondent's primary response to this contention is that it had previously told the Union that supervisors would be operating production equipment, but would not be making salable product. The Respondent also offers that had the Union really believed that it was producing a salable product, rather than scrap, it could have asked to review readily available production records, but that the Union never made a request. "It cannot be said that a union would be fulfilling its statutory responsibility of policing a contract by blindly accepting a respondent's assertions as to . . . what the requested information would show." *Ormet Aluminum Mill Products*, 335 NLRB 788, 802 (2001). Nor does the Respondent's belated argument that the Union could have asked to review production records prepared by the Respondent satisfy its burden to establish "those factors which would support a conclusion that its property right is paramount to the union's right of reasonable access." *New Surfside Nursing Home*, 322 NLRB at 535, citing *Hercules Inc.*, supra.

The Respondent concludes its argument by stating that “given legitimate safety, operational and managerial interests” the Respondent’s right to control access to its premises must predominate. The evidence does not establish that these generalized concerns were made know to the Union. The evidence does establish that safety was a union concern. There is no evidence that the Union ever sought to interrupt, or interfere, in anyway with the Respondent’s operation. Perhaps “managerial interests” is the Respondent’s concern about union officials observing the ability of nonunit employees to operate the equipment. If that is the case, counsel for the General Counsel offers a solution. Once the union representatives were able to determine that the work product was being discarded, and that the operation did not pose a safety threat to unit members throughout the facility, access could have been curtailed. See *Holyoke*, supra at 1370 (limiting access to reasonable periods).

In conclusion I find that the Union’s interest in observing the process is substantial and the Respondent’s interest in denying the union officials access to the Tedlar area is insignificant. Accordingly, I find that the Respondent, by denying employees serving in their capacities as union officers access to the plant when they are attempting to investigate potential grievances, violated Section 8(a)(1) of the Act.

In determining whether an 8(a)(1) violation has occurred, the test is whether the employer’s conduct reasonable tends to interfere with the free exercise of employee’s Section 7 rights under the Act. Counsel for the General Counsel contends that Watson’s statements to the union officials, threatening them with discipline if they did not leave the Tedlar area, reasonably tended to interfere with the Section 7 rights of employees serving in their capacity as union representatives. The statements are clearly threats, and were not denied by Watson when he testified. The Respondent, has not briefed this issue. Accordingly, I find that the Respondent threatened union representatives with discipline for refusing to leave the Tedlar area of its facility when they were attempting to investigate potential grievances, in violation of Section 8(a)(1) of the Act.

*E. The Alleged Refusal to Bargain Over Visitation of Jobsites Where Bargaining Unit Work is Being Performed*

1. Facts

Paragraph IX(c) of the complaint alleges that since on or about February 2, 2001, the Respondent has refused to bargain over the Union’s visitation of jobsites located outside of the Respondent’s facility where bargaining unit work is being performed. The record establishes that unit employees are assigned to perform production work at facilities owned by other entities. Thus, Guralny credibly testified that in early 2001 lab analysts were sent to subcontractors JACO/Rave and Plas-Lok, for various production purposes. Also during that time period unit employees performed production work at an Excel warehouse in suburban Buffalo, New York.

Guralny testified that he had previously asked Brauer if he could visit JACO and Plas-Lok to investigate safety matters that had been raised by unit employees assigned to those facilities. He also wanted to see the working conditions that existed in the Excel warehouse. The parties had no procedure for dealing with offsite visits by union representatives. On February 2, 2001, he gave Brauer a written request for him and the Union’s safety representative to visit the three locations (GC Exh. 20). Brauer said that she would determine the past practice and see what she could do. Guralny mentioned the request to Brauer on February 5, and she again said that would work on it. Guralny next raised the issue at a March 12 executive board meeting. The Respondent asked, “[W]hat specifically the Union was looking

for” regarding visitation. Guralny responded that the Union wanted someone to report to the Union regarding the work being performed and the safety of the employees. This statement was consistent with the statement contained in the written request that was given to Brauer over a month before.

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In April 2001, with still no visitation procedure in place, Guralny and Hanson went to Brauer and asked to visit Aglade, another offsite subcontractor. The union representatives had received notice that unit employees were being sent to Aglade and the Union wanted to go with them to assess the safety of the facility and the some new equipment. Brauer said that she would work on it. When the time approached for the employees to leave Brauer still had not responded to the union representative’s request. Guralny and Hanson went to Brauer and told her that they were going to go unless she had some objection. Brauer accompanied them on the visit. This visit occurred after the charge was amended in Case 3–CA–22854 on March 17,2001, to include the allegation concerning the Respondent’s refusal to negotiate a visitation procedure (Tr. 448). At the hearing, Casinelli testified that the Respondent was in the process of setting up a visit to the Excel warehouse.

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## 2. Analysis and discussion

Counsel for the General Counsel contends that bargaining over the right of Union representatives to visit the offsite jobsites of subcontractors, where unit employees are performing bargaining unit work, is a mandatory subject of bargaining. Counsel for the General Counsel submits that a host of issues would be appropriate for bargaining, such as: the procedure the union representative would follow to obtain release from the Respondent’s facility, the amount of time permitted for the offsite visit, the remuneration, if any, that the union representative would receive, and whether the representative would be accompanied by a management representative. Counsel for the General Counsel has not, however, cited any authority which explicitly declares such a proposal a mandatory subject of bargaining. Counsel for the General Counsel, instead, argues by analogy, that “just as union access to an employer’s own facility, to fulfill the union’s representational role, is a mandatory subject of bargaining, access to a subcontractor’s facility to observe bargaining unit employees is also a mandatory subject.”

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In *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979), the Supreme Court upheld a Board finding that in-plant food prices and services are a mandatory subject of bargaining. In *E. I. du Pont & Co.*, 301 NLRB 155 (1991), the Board characterized the Court’s decision as resting “primarily on the following considerations: (1) that the matter is of deep concern to workers; (2) that the matter is plainly germane to the working environment; and (3) that the matter is not among those managerial decisions which lie at the core of entrepreneurial control.” See also *Verizon New York, Inc.*, 339 NLRB No. 6, slip op at 1–2 (2003).

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Applying the foregoing criteria I find, in agreement with counsel for the General Counsel, that the matter is a mandatory subject of bargaining. The unit employees had expressed their concern about their offsite working environment to their union representatives. Nor does the subject matter intrude on managerial decisions which lie at the core of entrepreneurial control. The Respondent does not contend otherwise.

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The Respondent instead paraphrases the complaint as “refusing Union requests to visit off-premises locations where bargaining unit work was allegedly being performed.” Perhaps the initial union requests were unclear, but there can be no ambiguity after March 17, 2001, when the charge in Case 3–CA–22854 was amended to include the refusal to bargaining allegation. The substance of the Respondent’s argument is that its failure to arrange a timely inspection of

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the Excel warehouse is at most de minimis. Refusal to bargain over a mandatory subject of bargaining is not de minimis, nor does the fact that the Union made one offsite visit satisfy the Respondent's duty to bargain in good faith over a mandatory subject of bargaining.

5 I conclude that the Respondent has refused to bargain over the Union's visitation of job sites located outside the Respondent's facility where bargaining unit employees are performing unit work, in violation of Section 8(a)(1) and (5) of the Act.

*F. The Unilateral Changes to the Health Benefit Plan*

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Paragraphs IX(n), (o), and (p), and XI of the complaint allege that on or about October 1, 2001, the Respondent unilaterally implemented changes to the health benefit plan in effect for unit employees, including, but not limited to, changes to employee premiums, copays, deductibles and stop losses, prescription drug payments, health insurance options, and working spouse converge. These changes are alleged to be independent violations of the Act, and therefore are not dependent on the previous finding that the Respondent's declaration of impasse on April 12, 2001, and implementation of its final offer on April 23, 2001, were unlawful.

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1. Facts

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In 1991, the Respondent and the Union entered into a supplemental agreement that incorporated the Beneflex Flexible Benefits Plan (Beneflex) into the existing bargaining agreement. The Supplemental agreement states, in relevant part:

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(Add as Article XIV, Section 3): "In addition to receiving benefits pursuant to the Plans and Practices set forth in Section 1 above, employees shall also receive benefits as provided by the COMPANY'S Beneflex Flexible Benefits Plan, subject to all terms and conditions of said Plan." (GC Exh. 46B, par. 2).

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Beneflex is an employer sponsored, self-insured, benefit program with a number of components, including medical, dental, and vision care, life insurance, and a vacation "buyback" program. In 1993, the employees were also covered by the Blue Cross/Blue Shield health care plan. The Beneflex Plan, which was adopted January 1, 1992, effective January 1, 1994, and amended on December 1, 1997, contains a "Modification or Termination of the Plan" provision in Article XIII, that provides, in pertinent part:

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The company reserves the sole right to change or discontinue this Plan in its discretion provided, however, that any change in price or level of coverage shall be announced at the time of annual enrollment and shall not be changed during a Plan Year unless coverage provided by an independent, third-party provider is significantly curtailed or decreased during the Plan Year. Termination of this Plan or any benefit plan incorporated herein will not be effective until one year following the announcement of such change by the Company. [GC Exh. 46A, par. XIII.]

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In October 1993, the Respondent proposed the elimination of all local insurance options, replacing them with a self-funded, managed-care Beneflex Plan. This Beneflex Plan would include an initial cost share of 80/20, with 80-percent being contributed by the Respondent and 20-percent by the employees, with the employees and the Respondent sharing the cost on a 50/50 basis after January 1, 1997. The parties were unable to reach agreement, and in September 1994, the Respondent implemented its final offer. The health care component of the

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implemented offer provided the Beneflex Medical Care Plan, and eliminated the other health care options, i.e., Blue Cross/Blue Shield and HMOs. Thus, all unit employees were now enrolled in the Beneflex Plan, with managed care and a new cost share.

5 In response to the implementation, the Union filed unfair labor practice charges alleging unlawful impasse. These charges were resolved when the parties entered into a Board informal settlement agreement on February 21, 1997 (GC Exh. 4). Under the agreement unit employees were “responsible for paying the ‘employee share’ of premiums at the 1996 levels until  
10 agreement or good faith impasse in bargaining is reached.” The agreement also required that the Respondent “not unilaterally impose any future premium increases on the bargaining unit employees until agreement or good faith impasse is reached in bargaining.” (GC Exh. 4, par. 5a.) As a result the unit employees paid a cost share with the premiums frozen at the 1996 level.

15 Area Human Resources Superintendent Anthony Casinelli, testified that it was the Respondent’s position that the settlement agreement only required that the premium rate be frozen at the 1996 level, but that the other cost components of the Plan i.e., copays, deductibles, stop/losses, etc., were not frozen. He also acknowledged that the Union’s position was that all costs were frozen at the 1996 level. Casinelli future testified that the Respondent  
20 paid more for the unit employees than nonunit employees, because of the frozen premiums. Casinelli said that from 1993 through 2001, about half of the employees’ cost share was premium, and the other half was copay, deductible, and stop-lost amounts. Thus, the corporatwide cost sharing percentage could vary from an individual’s cost sharing percentage based on the individual’s use of the plan (Tr. 1561–562).

25 On January 12, 2001, the Respondent presented its final offer. The final offer retained the Beneflex Plan (GC Exh. 18A, art. XVI, sec. 2, p. 24), with the added option of coverage under a local HMO (GC Exh. 18A, art. XVIII, sec. 3, p. 27). The major change related to the premiums:

30 Participants will pay for premiums, co-pays, co-insurance and deductibles established for a particular plan year. (The projected Du Pont participant cost share for year 2001, based on actuarial analysis, is 75/25.) Projected increases for future plan years will be shared equally between Du Pont and participants, provided, however, such increases may be allocated to premiums, components  
35 of plan design, or any combination thereof. [GC Exh. 18A, art. XVIII, sec. 1(A), p. 27.]

40 In essence, the premiums were defrosted and the increased cost would be phased in over the next 2 years.

45 In October 2001 the Respondent announced changes in the Beneflex Plan, effective January 2001. These included increases in premiums, copays, deductibles, stop/loss amounts, and the working spouse criteria. The changes also included new benefits, such as a prescription drug stop/lost, reduction in premiums for vision care, and increases in the maximum contribution for flexible spending accounts. In a letter dated October 22, 2001, the Union protested the changes, contending that the Union had not been notified of the changes, that the Respondent had an obligation to bargain in good faith over the changes and insisting that the Respondent rescind the announced changes and commence bargaining. The Union also  
50 commented that the management rights provision is without effect. (GC Exh. 49.) The Respondent, without responding to the letter, implemented the changes as planned.

Casinelli testified that through various companywide written forms of communications, as well as specific meetings with the Union, the Respondent repeatedly informed the Union about the annual changes to the Beneflex plan. The Respondent adjusted the unit employee's co-pays, deductibles, and stop losses, from the time of the 1997 settlement agreement until April 2001, when the Respondent declared impasse. Casinelli also testified that the Union did not protest any of the previous changes in the Beneflex plan, and that the 2002 changes were consistent with the settlement agreement and the Respondent's final offer.

## 2. Analysis and discussion

Health insurance benefits are a mandatory subject of collective-bargaining agreement that an employer may not alter without bargaining to mutual agreement or a good-faith impasse. *Mid-Continent Concrete*, 336 NLRB 258 (2001), *enfd.* 308 F.3d 859 (8th Cir. 2002). The law concerning waiver of statutory rights, here the right to be notified about a substantial change in a benefit, is clear, the waiver must be clear and unmistakable. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983); See also, e.g., *Dearborn Country Club*, 298 NLRB 915 (1990). Board precedent is equally clear—"a union's acquiescence in previous unilateral changes does not operate as a waiver of its right to bargain over such changes for all time." *King Soopers, Inc.*, 340 NLRB No. 75, *slip. op.* at 13 (2003), citing *Owens-Brockway Plastic Products*, 311 NLRB 519, 526 (1993), quoting *Owens-Corning Fiberglass*, 282 NLRB 609 (1987). See also, e.g., *Mississippi Power Co.*, 332 NLRB 530, 531 (2000), quoting *Exxon Research & Engineering Co.*, 317 NLRB 675, 685-686 (1995), *enf. denied on other grounds* 89 F.3d 228 (5th Cir. 1996). "[U]nion acquiescence in past changes to a bargainable subject does not betoken a surrender of the right to bargain the next time the employer might wish to make yet further changes, not even when such further changes arguably are similar to those in which the union may have acquiesced in the past."

Assuming a good-faith impasse, the employer, generally, may implement the terms and conditions of employment that were contemplated by its preimpasse proposals. Not all preimpasse proposals, however, may be implemented. In *McClatchy Newspapers*, 321 NLRB 1386 (1996), *enfd.* 131 F.3d 1026 (D.C. Cir. 1997), the Board recognized a narrow exception to the implementation-upon-impasse rules. The employer in *McClatchy* insisted to impasse, and then implemented, a proposal reserving to itself sole discretion concerning merit wage increases. The Board observed that the right to implement previous proposals, does not mean the end of the bargaining process. The Board stated that if the employer was granted "carte blanche authority over wage increases (without limitation as to time, standards, criteria, or the [union's] agreement)," the result would be inherently destructive of the fundamental principles of collective bargaining.

In *KSM Industries*, 336 NLRB 133 (2001), reconsideration granted in part 337 NLRB 987 (2002), substantive result unchanged, the Board held that the employer unlawfully implemented its medical and dental insurance proposal after reaching impasse. The employer's proposal reserved to its sole discretion the right to change unilaterally the provider, the plan design, the level of benefit and the administrator so long as the change was company wide. Without negotiation, or discussion, the Respondent changed the health insurance benefits, including increases in deductibles and out-of-pocket expenses. The Respondent presented these changes to the union as a *fait accompli*. The Board found that the employer's implementation of the proposal was "inimical to the postimpasse, on-going collective-bargaining process" because it "left no room for bargaining between the union and the employer about the manner, method and means of providing medical and dental benefits during the term of the contract" and thus "nullified the [u]nion's authority to bargain over the existence and the terms of a key term and condition of employment." *Id.* at 135. The Board specifically found "no principled reason" to

distinguish *KSM* from *McClatchy* on the basis that *KSM* involves health insurance rather than wages. *Id.* at 135 fn. 6.

5 The Respondent's primary justification for unilaterally implementing the changes to the health benefit plan is that its action was consistent with the past practice of the parties. The employer has the burden of establishing that a unilateral post expiration change was consistent with past practice. *Eugene Lovine, Inc.*, 328 NLRB 294 fn. 2 (1999), *enfd. mem.* 242 F.3d 366 (2d Cir. 2001). From December 1993, when the Respondent terminated the collective-bargaining agreement and all supplemental agreements, until October 2001, the Respondent made unilateral changes to the health care coverage. The Union admits that before the April 10 23, 2001 implementation it did not demand bargaining or object to the various changes made to the Beneflex Plan. The fact that there was no formal objection does not mean that the Union agreed with the changes. Casinelli testified that at some point in time, and probably more than once, the Union challenged the Respondent's assertion that the settlement agreement permitted 15 increasing all costs other than the premiums (Tr. 1786).

20 The Respondent places much reliance on *Post-Tribune Co.*, 337 NLRB 1279 (2002). In that case the Board found that the employer had a consistent, established past practice of allocating health insurance premiums on an 80/20-percent and 60/40-percent basis. Although the insurance carrier increased the premium, and, thus, the dollar amount of the employees payroll deduction, that did not alter the status quo, the employees continued to pay 20 percent or 40 percent of the new premium.

25 The Respondent does not appear to be contending that its changes to the premiums are based on past practice. It appears that the premium changes that were made by the Respondent between 1994 and February 21, 1997, were the subject of unfair labor practice charges that the parties settled in 1997. As a result of the settlement agreement the premium was frozen at the 1996 level. Thus, it was the settlement agreement that fixed the cost of the premium and not past practice. 30

35 The Respondent did, however, change the other cost factors related to the Beneflex plan on an annual basis. But these changes, were not consistent with maintaining the status quo. Unlike the employer in *Post-Tribune Co.*, the Respondent here, is itself the insurer. As such it determines not only the total cost share, but the costs, including the premiums, of the other cost share factors (Tr. 1777, 1788). For instance, in 1996 the Respondent determined that from then on the total health care costs would be shared on a 50/50 basis, rather than 80/20 (R. Exh. 86). In 1997, the Respondent chose to increase the monthly health care premium \$20 per month "on average," in order to maintain what it determined was the employees' share of the overall health care cost. The Respondent defines "on average" as representing a composite of costs of all 40 single, two-person and family coverage. The monthly average includes a portion for premiums with the balance resulting from a combination of copays, deductibles, and coinsurance. The actual costs varies depending on the employees use of medical services. (R. Exh. 89.)

45 The unfettered discretion that the Respondent has regarding the Beneflex Plan is yet another impediment to the post impasse implementation of this proposal. Not only does article XIII retain for the Respondent the sole right to change or discontinue the plan, but Casinelli testified that the "design as to where the cost share elements would be changed was something that the company would do. It would be done on a company wide basis" (Tr. 1788). I find that this holding in *KSM* is controlling as to this portion of the case. Thus, the Respondent's 50 announced changes in October 2001 were presented not only as a *fait accompli*, but it then proceeded to ignore the union request that the changes be rescinded and that the Respondent bargain over any charge. As in *McClatchy* and *KSM* the Respondent's conduct nullified the

Union's authority to bargain over the existence and the terms of a key term and condition of employment. Accordingly, as in *McClatchy* and *KSM*, I find the Respondent's implementation of the Beneflex Plan was inimical to the post impasse, on-going collective-bargaining process, I further find that the Union did not waive its right to bargain over the health plan, and thus, the Respondent violated Section 8(a)(1) and (5) of the Act when it unilaterally implemented changes to the health benefit plan in effect for the unit employees without bargaining with the Union.

*G. The Alleged Unilateral Implementation of Production Incentive Programs*

In paragraphs IX(b), (o), and (p) and XI of the complaint the General Counsel submits that the Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally implementing four production incentive programs in the Corian bowl sanding and finishing department without providing the Union with notice and an opportunity to bargain concerning these programs. At the hearing the counsel for the General Counsel moved to amend paragraph IX(b) of the second amended consolidated complaint to specify the four incentive programs at issue. The incentive programs and the alleged dates of implementation are: (1) 100 bowl club, June 30, 1998; (2) packing 600 bowls or units by an entire shift, April 14, 2000; (3) packing 2500 units in one week by an entire shift, August 18, 2000; and (4) sealing or packing three trucks, December 5, 2000. (Tr. 466; GC Exh. 24.)

The motion to amend was granted over the Respondent's objection. The Respondent argues, at the hearing, and in its brief, that three of the programs are barred by Section 10(b) of the Act because the alleged implementation of each is more than 6 months before the filing of the charge. The charge was filed on March 5, 2001, hence the 10(b) period began on September 5, 2000. Thus, the only incentive program within the 6-month period is the sealing or packing three trucks, allegedly implemented on December 5, 2000. Counsel for the General Counsel acknowledges that the other implementation dates are outside of the 10(b) period, but argues that the time period only starts when the Union has actual or constructive notice that is clear and unequivocal of the unlawful activity or when a party in the exercise of reasonable diligence should have been aware that there has been a violation of the Act. Counsel for the General Counsel contends that the record does not establish that the Union knew about the award programs before January 19, 2001, when it requested information concerning the program. The request for information is also a complaint allegation, which is addressed above. The incentive programs and request for information allegations are separate from, and independent of, each other.

I will first address the "sealing and packing three trucks" allegation that was implemented on December 5, 2000, a date which the parties agree is within the 10(b) period.

1. Facts

The parties agree that a "Plant Recognition Procedure" has been in place since at least February 1995 (GC Exh. 50). The written procedure is a lengthy, detailed document, the stated purpose of which is to: (1) accelerate change in an organization's culture to create a positive environment; (2) communicate and reinforce desired behaviors and values; (3) reward extraordinary accomplishments; or (4) motivate contributions to business objectives. The procedure even has a provision for including spouses in the recognition.

The parties also agree that since the creation of the Plant Recognition Procedure, employees could earn "safety bucks." These were valued between \$.50 and \$1 and were awarded for working safely, participating in safety meeting, and safety improvements. They could be redeemed for movie passes or gift certificates that could be used at various retail

stores and restaurants. Two union witnesses testified that in addition to safety, the awards were given for “certain milestones” such as attendance (Tr. 367) or improvements that could “help the corporate goals”(Tr. 170). Guralny also stated that in August 1999 he was the chairman of the safety committee. In that capacity he chaired a union-management safety meeting in August 5 1999, where “awards being given for certain numbers” was mentioned (Tr. 583–586.)<sup>4</sup> The Union is not protesting the award of safety bucks or the recognition program in general. The dispute centers on recognition awards that are based on numbers. Counsel for the General Counsel refers to those as unlawful, unilaterally implemented, production incentives. The Respondent contends that they are part of the evolving continuum of the employee recognition 10 procedure that has been ongoing since 1995.

## 2. Analysis and discussion

15 It is well established that an employer is prohibited from making changes related to wages, hours, or terms and conditions of employment without first affording the employees’ bargaining representative a reasonable and meaningful opportunity to discuss the proposed modifications. *NLRB V. Katz*, 369 U.S. 736, 743 (1962). It is equally well established that a unilateral change in a mandatory subject of bargaining is unlawful only if it is “material, substantial, and significant.” *Alamo Cement Co.*, 281 NLRB 737, 738 (1986).

20 I agree with counsel for the General Counsel that the awards are a mandatory subject of bargaining, and the Respondent does not argue to the contrary, I disagree with the cases cited in support of that proposition. In *Branch International Services*, 310 NLRB 1092, 1097 (1993), the “production incentive pay system” in issue, represented 25-percent of an employee’s earnings. In *Jimmy Dean Meat Co.*, 227 NLRB 1527, 1528 (1977), the employer unilaterally 25 implemented a new incentive bonus plan as a substitute for twice yearly general wage increases. Here there is no evidence that the awards in issue involved cash, let alone a substantial amount of cash.

30 In fact one of the stated principles of the Recognition Procedure is that “[c]are must be exercised not to provide such large awards that it infringes upon compensation.” Although there are target percentages for the number of employees to be recognized, the percentages are not quotas. (GC Exh. 50, pp. 7771, 7775.) There is no evidence that any employee was told that they were required to produce a certain amount, or complete a certain task, within a fixed time 35 frame. There is no evidence that any employee was disciplined for not producing a certain amount, or for not completing a certain task within a fixed time frame. There is no evidence that any employees was ever disciplined for never getting an award. The recognition procedure under which the Respondent issues the recognition awards is a bona fide recognition procedure, the establishment of which is not under challenge by the General Counsel. The 40 award implemented on December 5, 2000, is not a material, substantial, and significant change from the Respondent’s preexisting recognition program. It is the same as the other three awards in issue and I find that all the awards are totally consistent with, and part of, the Respondent’s well documented and long-standing Recognition Procedure. As with any valid recognition plan, the objectives and the accomplishments that management wants to recognize 45 will, from time-to-time, change. If the new objectives, achievements, and awards are not material, substantial, and significant changes to the existing employee recognition plan or procedure, the employer has maintained the status quo, and has not violated the Act. I find this to be the case here and accordingly, I recommend that this allegation be dismissed.

50 <sup>4</sup> Counsel for the General Counsel relies on R. Exhs. 10 and 11. Although identified on the record, they were not moved into evidence.

### 3. Alternate finding

5 I have recommended that the one timely allegation contained in paragraph IX(b) of the complaint be dismissed. There is no contention that the three remaining, untimely allegations, differ in any substantive way from the timely allegation. Because the result would be the same, I see no need to address the 10(b) issue. I will, however, make the requisite findings, in case the Board finds it necessary to address the 10(b) issue.

10 Section 10(b) states in pertinent part that “[N]o complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge with the Board.” Section 10(b) is a statute of limitations and is not jurisdictional in nature. It is an affirmative defense which must be pleaded and if not timely raised, is waived. E.g., *Federal Management Co.* 264 NLRB 107 (1982). The burden of proving an affirmative defense is on the party asserting the defense. E.g., *Kelly’s Private Care Service*, 289 NLRB 30 (1988). Although  
15 the statute of limitations period begins only when the unfair labor practice occurs, Section 10(b) is tolled until there is either actual or constructive notice of the alleged unfair labor practice. E.g., *Mine Workers Local 17*, 315 NLRB 1052 (1994). Notice, however, may be found even in the absence of actual knowledge if a charging party has failed to exercise reasonable diligence, i.e., the 10(b) period commences running when the charging party either knows of the unfair  
20 labor practice or would have “discovered” it in the exercise of “reasonable diligence.” *Oregon Steel Mills*, 291 NLRB 185, 192 (1988). The knowledge of bargaining unit employees concerning their terms and conditions of employment may be imputed to their bargaining representative for purposes of determining when the 10(b) limitations period commences  
25 depending on the factual context. *Nursing Center at Vineland*, 318 NLRB 337, 339 (1995).

Guralny, the president of the local Union, testified that he chaired a union-management safety meeting in August 1999, where “awards being given for certain numbers” was mentioned (Tr. 582–584). I do not credit his statement that he did not pay attention to that part of the  
30 conversation. I also note that Guralny credibly testified in regard to the incident where he was denied access to an area to investigate a grievance, above, that he had never been denied access to visit any area of the plant at anytime (Tr. 262-264). The record also demonstrates that the Union acted on rumors, and information that it got through the “grapevine” (Tr. 711-712), indicating that it had, at the very least, an adequate communications network throughout  
35 the facility.

Rory Watson, CCMC production superintendent from 1997 to 2000 (Tr. 309), identified several Union stewards and representatives who received awards dating back to 1999 (GC Exh. 5a). The most convincing evidence that the Union should have “discovered” the awards  
40 program, had it exercised any amount of diligence, is from the testimony of employees Germain Williams and Kathy Eagen. They testified that the awards were announced by first-line supervision at the daily shift meetings. The awards, as well as letters of recognition, were presented to the employees during these meetings. Thus, in agreement with the Respondent, I find that the recognition program at the facility was “open and notorious.” This practice is also  
45 consistent with a stated objective of the program, “to communicate and reinforce desired behaviors and values” (GC Exh. 50 p. 7768). Based on the foregoing I would find, if necessary, that the Respondent has met its burden of showing that the three earliest allegations contained in paragraph IX(b) of the complaint (GC Exh. 24) are untimely under Section 10(b) of the Act.

### 50 Conclusions of Law

1. The Respondent is engaged in commerce within the meaning of Section 2(2), (6), and

(7) of the Act, and has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

5

3. At all times material here, the Union, as the successor to the Buffalo Yerkes Union, has been the exclusive collective-bargaining representative of the employees in the following unit that is appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

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All production and maintenance employees at Respondent's Tonawanda, New York, facility, including plant clericals, analysts, and CCMC Finishers, excluding office clericals, professional employees, guards and supervisors as defined in the Act.

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4. The Respondent, by Rory Watson and Anthony Casinelli, violated Section 8(a)(1) of the Act on September 23, 2000, by denying access to its Tonawanda, New York facility to union representatives investigating grievances.

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5. The Respondent, by Rory Watson violated Section 8(a)(1) of the Act on September 23, 2000, by threatening representatives of the Union with discipline if they failed to leave Respondent's Tonawanda, New York facility.

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6. The Respondent violated Section 8(a)(1) and (5) of the Act by unreasonably delaying in providing relevant and necessary information to the Union on September 28, 2000, regarding milling and finishing matters, as alleged in paragraphs VIII(a) and (f), and XI of the complaint.

30

7. The Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to provided relevant and necessary information to the Union on January 19, 2001, regarding incentive programs and investigative notes, as alleged in paragraphs VIII(b), (c), (g), and (h), and XI of the complaint.

35

8. The Respondent violated Section 8(a)(1) and (5) of the Act by failing and refusing to provided relevant and necessary information to the Union on April 23, 2001, regarding the subcontracting of milling and finishing work, as alleged in paragraphs VIII(d), (i), and XI of the complaint.

40

9. The Respondent violated Section 8(a)(1) and (5) of the Act by refusing to bargain over the Union's visitation of job sites located outside the Respondent's Tonawanda, New York facility, where bargaining unit work is being performed.

45

10. The Respondent violated Section 8(a)(1) and (5) of the Act by, since on or about March 19, 2001, refusing to bargain over milling and finishing work on Corian bowls as part of collective-bargaining negotiations for a successor agreement and insisting that this issue be discussed in separate negotiations.

50

11. The Respondent violated Section 8(a)(1) and (5) of the Act by, since on or about May 1, 2001, subcontracting the milling and finishing work on Corian bowls without reaching an agreement with the Union, or bargaining in good faith to a valid impasse over the decision to subcontract the milling and finishing work on Corian bowls.

12. The Respondent violated Section 8(a)(1) and (5) of the Act by, on or about April 12, 2001, prematurely declaring an impasse in bargaining for a successor agreement and

announcing it would implement its final offer on April 23, 2001, notwithstanding its failure to reach a good-faith impasse in bargaining regarding the subcontracting of milling and finishing work on Corian bowls.

5           13. The Respondent violated Section 8(a)(1) and (5) of the Act by, on or about April 23, 2001, unilaterally implementing terms and conditions of employment that were a part of its final offer, notwithstanding that the parties were not at a good-faith impasse in bargaining.

10           14. The Respondent violated Section 8(a)(1) and (5) of the Act by, on or about October 1, 2001, unilaterally implementing changes to the health benefit plan in effect for Unit employees, including, but not limited to, changes to employee premiums, copays, deductibles and stop losses, prescription drug payments, health insurance options, and working spouse coverage.

15           15. The Respondent did not violate Section 8(a)(1) and (5) of the Act by, engaging in effects bargaining at a time when bargaining over the decision to subcontract the milling and finishing work on Corian bowls had not been completed.

20           16. The Respondent did not violate Section 8(a)(1) and (5) of the Act by setting a deadline for conclusion of bargaining over a severance plan for those employees who would be displaced as a result of the subcontracting of milling and finishing work on Corian bowls.

25           17. The Respondent did violate Section 8(a)(1) and (5) of the Act by unilaterally implementing a production incentive program.

#### Remedy

30           Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Counsel for the General Counsel requests that the remedy in *Transmarine Navigation Corp.*, 170 NLRB 389 (1968), be awarded, as well as, a restoration order restoring the Corian milling and finishing bargaining unit work to the Respondent's facility. The *Transmarine* remedy is the traditional remedy for an effects bargaining violation. E.g., *Champion International Corp.*, 339 NLRB No. 80 (2003). I have found that the Respondent failed to bargain in good faith over the decision to subcontract the Corian milling and finishing bargaining unit work. I find that this case is appropriate for a remedy that would restore the status quo ante, including restoration of the milling and finishing work, and the standard reinstatement and backpay order. Accordingly, I shall recommend that the Respondent restore the Corian milling and finishing bargaining unit work, and the equipment to perform the work, to its facility in Tonawanda, New York. At the compliance stage of this proceeding the Respondent may introduce evidence, that was not available at the time of the unfair labor practice hearing, to establish that restoration of the work and the equipment is not appropriate. See *Cold Heading Co.*, 332 NLRB 956 fn. 5 (2000), and cited cases; *Elliott Turbomachinery Co.*, 320 NLRB 141 (1995); *Lear Sigler, Inc.*, 295 NLRB 857, 861-862 (1989).

50           In addition to restoring the Corian milling and finishing bargaining unit work, I recommend that the Respondent offer the employees who were laid off pursuant to the unlawful decision to subcontract the Corian milling and finishing bargaining unit work reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of layoff to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New*

*Horizons for the Retarded*, 283 NLRB 1173 (1987).

I have found that the Respondent violated Section 8(a)(1) and (5) of the Act by, on or about April 23, 2001, unilaterally implementing terms and conditions of employment that were a part of its final offer, notwithstanding the absence of a valid good-faith impasse in bargaining. I have also found that the Respondent violated Section 8(a)(1) and (5) of the Act by, on or about October 1, 2001, unilaterally implementing changes to the health benefit plan in effect for Unit employees, including, but not limited to, changes to employee premiums, copays, deductibles and stop losses, prescription drug payments, health insurance options, and working spouse coverage. Accordingly, I shall recommend that the Respondent, on the request of the Union, rescind any changes in the terms and conditions of employment that it has unlawfully implemented. To the extent that unit employees suffered economic detriment as a consequence of the Respondent's unlawful unilateral changes the Respondent is required to make them whole, plus interest as computed in *New Horizons for the Retarded*, supra.

Counsel for the General Counsel also requests that the Board order the Respondent to "reimburse employees entitled to a monetary award for any extra federal and/or state income taxes that would or may result from the lump sum payment of the award." This aspect of the proposed Order would involve a change in Board law. See, e.g., *Hendrickson Bros.*, 272 NLRB 438, 440 (1985), *enfd.* 762 F.2d 990 (2d Cir. 1985). This issue has not been briefed by the parties and because it involves a change in Board law, it is best reserved for the Board. Accordingly, the request to include the additional relief is denied. *Campbell Electric Co.*, 340 NLRB No. 93, slip op. at 3 fn. 11, slip op. at 20 fn. 45 (2003).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>5</sup>

#### ORDER

The Respondent, E.I. du Pont de Nemours & Company, Tonawanda, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Denying employees, serving in their capacities as union representatives, access to the facility when they are attempting to investigate potential grievances.

(b) Threatening representatives of the Union with discipline for refusing to leave the facility when they are investigating potential grievances.

(c) Unreasonably delaying providing relevant and necessary information to the Union regarding milling and finishing matters.

(d) Failing and refusing to provided relevant and necessary information to the Union regarding incentive programs and investigative notes.

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<sup>5</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(e) Failing and refusing to provided relevant and necessary information to the Union regarding the subcontracting of milling and finishing work.

5 (f) Refusing to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of the unit of employees set forth below, concerning the Union's proposal to visit job sites located outside the facility, where bargaining unit work is being performed. The appropriate unit is:

10 All production and maintenance employees at Respondent's Tonawanda, New York, facility, including plant clericals, analysts, and CCMC Finishers, excluding office clericals, professional employees, guards and supervisors as defined in the Act.

15 (g) Refusing to bargain collectively and in good faith with the Union as the exclusive collective-bargaining representative of the unit of employees set forth above, over milling and finishing work on Corian bowls as part of collective-bargaining negotiations for a successor agreement and insisting that this issue be discussed in separate negotiations.

20 (h) Subcontracting the milling and finishing work on Corian bowls without reaching an agreement with the Union, or bargaining in good faith to a valid impasse over the decision to subcontract the milling and finishing work on Corian bowls.

25 (i) Prematurely declaring an impasse in bargaining for a successor agreement and announcing it would implement its final offer on April 23, 2001, notwithstanding its failure to reach a good faith impasse in bargaining regarding the subcontracting of milling and finishing work on Corian bowls.

30 (j) Unilaterally implementing terms and conditions of employment that were a part of its final offer, notwithstanding that the parties were not at a good faith impasse in bargaining.

(k) Unilaterally implementing changes to the health benefit plan in effect for Unit employees.

35 (l) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

40 (a) Restore and resume the Corian milling and finishing bargaining unit work, and the equipment to perform the work, to its facility in Tonawanda, New York, and offer those employees who were laid off pursuant to the unlawful decision to subcontract the Corian milling and finishing bargaining unit work immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their  
45 seniority or any other rights or privileges previously enjoyed.

(b) Make the employees whole for any loss of earnings and other benefits suffered from their date of layoff to date of proper offer of reinstatement, as set forth in the remedy section of this decision.

50 (c) On request of the Union rescind any changes in the terms and conditions of employment of unit employees that it implemented on or after April 23, 2001.

(d) On request of the Union grant access to employees serving in their capacities as Union representatives to the facility, for a reasonable period of time, to allow them to investigate potential grievances.

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(e) On request, bargain with the Union as the exclusive representative of the employees in the appropriate unit, set forth above, concerning terms and conditions of employment, including but not limited to, the Union's proposal to visit job sites located outside the facility, where bargaining unit work is being performed, and the decision to subcontract the milling and finishing work on Corian bowls, and, if an understanding is reached, embody the understanding in a signed agreement.

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(f) On request of the Union, bargain with it over the terms and conditions of employment concerning Corian milling and finishing work in the same negotiating forum that is used to address wages, hours, and all other terms and conditions of employment for bargaining unit employees.

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(g) Provide the Union, to the extent that it has not already done so, with the relevant information it requested on September 28, 2000, regarding milling and finishing matters, on January 19, 2001, regarding incentive programs and investigative notes and on April 23, 2001, regarding the subcontracting of the Corian milling and finishing work.

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(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

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(i) Within 14 days after service by the Region, post at its facility in Tonawanda, New York, copies of the attached notice marked "Appendix."<sup>6</sup> Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 23, 2000.

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(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges

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<sup>6</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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violations of the Act not specifically found.

5 Dated, Washington, D.C. December 24, 2003

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John T. Clark  
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES  
 POSTED BY ORDER OF THE  
 NATIONAL LABOR RELATIONS BOARD  
 An Agency of the United States Government

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The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

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FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

15

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WE WILL NOT fail or refuse to bargain collectively and in good faith with Paper, Allied-Industrial, Chemical and Energy Workers, International Union (PACE) and its Local 1-6992, as the exclusive collective-bargaining representative of the employees in the appropriate unit by refusing to bargain about the Union's proposal to visit jobsites located outside the facility, where bargaining unit work is being performed, by refusing to bargain about milling and finishing work on Corian bowls as part of collective-bargaining negotiations for a successor agreement and insisting that this issue be discussed in separate negotiations, by prematurely declaring an impasse in bargaining for a successor agreement, and implementing our final offer on April 23, 2001, notwithstanding the absence of a good-faith impasse in bargaining regarding the subcontracting of milling and finishing work on Corian bowls. The appropriate unit is:

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All production and maintenance employees at our Tonawanda, New York, facility, including plant clericals, analysts, and CCMC Finishers, excluding office clericals, professional employees, guards and supervisors as defined in the Act.

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WE WILL NOT unilaterally subcontract the milling and finishing work on Corian bowls without reaching an agreement with the Union, or bargaining in good faith to a valid impasse over the decision to subcontract that work.

40

WE WILL NOT unilaterally implement changes to the health benefit plan without notifying the Union and affording it an opportunity to bargain.

45

WE WILL NOT unilaterally change the terms and conditions of employment of unit employees unless we have reached a valid impasse in bargaining regarding all issues that are still on the bargaining table.

WE WILL NOT deny employees, serving as union representatives, access to the facility when they are attempting to investigate potential grievances.

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WE WILL NOT threaten representatives of the Union with discipline for refusing to leave the facility when they are investigating potential grievances.

WE WILL NOT fail or refuse to bargain collectively and in good faith with the Union by unreasonably delaying providing relevant and necessary information to the Union regarding milling and finishing matters, and by failing and refusing to provide relevant and necessary

information to the Union regarding incentive programs and investigative notes, and the subcontracting of the Corian milling and finishing work.

5 WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

10 WE WILL restore and resume the Corian milling and finishing bargaining unit work, and the equipment to perform the work, to our facility in Tonawanda, New York, and offer those employees who were laid off pursuant to the unlawful decision to subcontract the Corian milling and finishing bargaining unit work immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

15 WE WILL make the employees whole for any loss of earnings and other benefits suffered from their date of layoff to date of proper offer of reinstatement, as set forth in the remedy section of this decision.

20 WE WILL on request of the Union grant access, to employees serving as union representatives, to the facility for a reasonable period of time, to allow them to investigate potential grievances.

WE WILL on request of the Union rescind any changes in the terms and conditions of employment of unit employees that we implemented on or after April 23, 2001.

25 WE WILL on request, bargain with the Union as the exclusive representative of the employees in the appropriate unit, set forth above, concerning terms and conditions of employment, including but not limited to, the Union's proposal to visit jobsites located outside the facility, where bargaining unit work is being performed, and the decision to subcontract the milling and finishing work on Corian bowls, and, if an understanding is reached, embody the understanding in a signed agreement.

30 WE WILL on request of the Union, bargain over the terms and conditions of employment concerning Corian milling and finishing work in the same negotiating forum that addresses wages, hours, and all other terms and conditions of employment for bargaining unit employees.

35 WE WILL provide the Union, to the extent that we have not already done so, with the relevant information it requested on September 28, 2000, regarding milling and finishing matters, on January 19, 2001, regarding incentive programs and investigative notes, and on April 23, 2001, regarding the subcontracting of the Corian milling and finishing work.

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E.I. du PONT de NEMOURS & COMPANY  
\_\_\_\_\_  
(Employer)

45 Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

50 The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlrb.gov](http://www.nlrb.gov).

111 West Huron Street, Federal Building, Room 901, Buffalo, NY 14202-2387  
(716) 551-4931, Hours: 8:30 a.m. to 5 p.m.

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (716) 551-4946.

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